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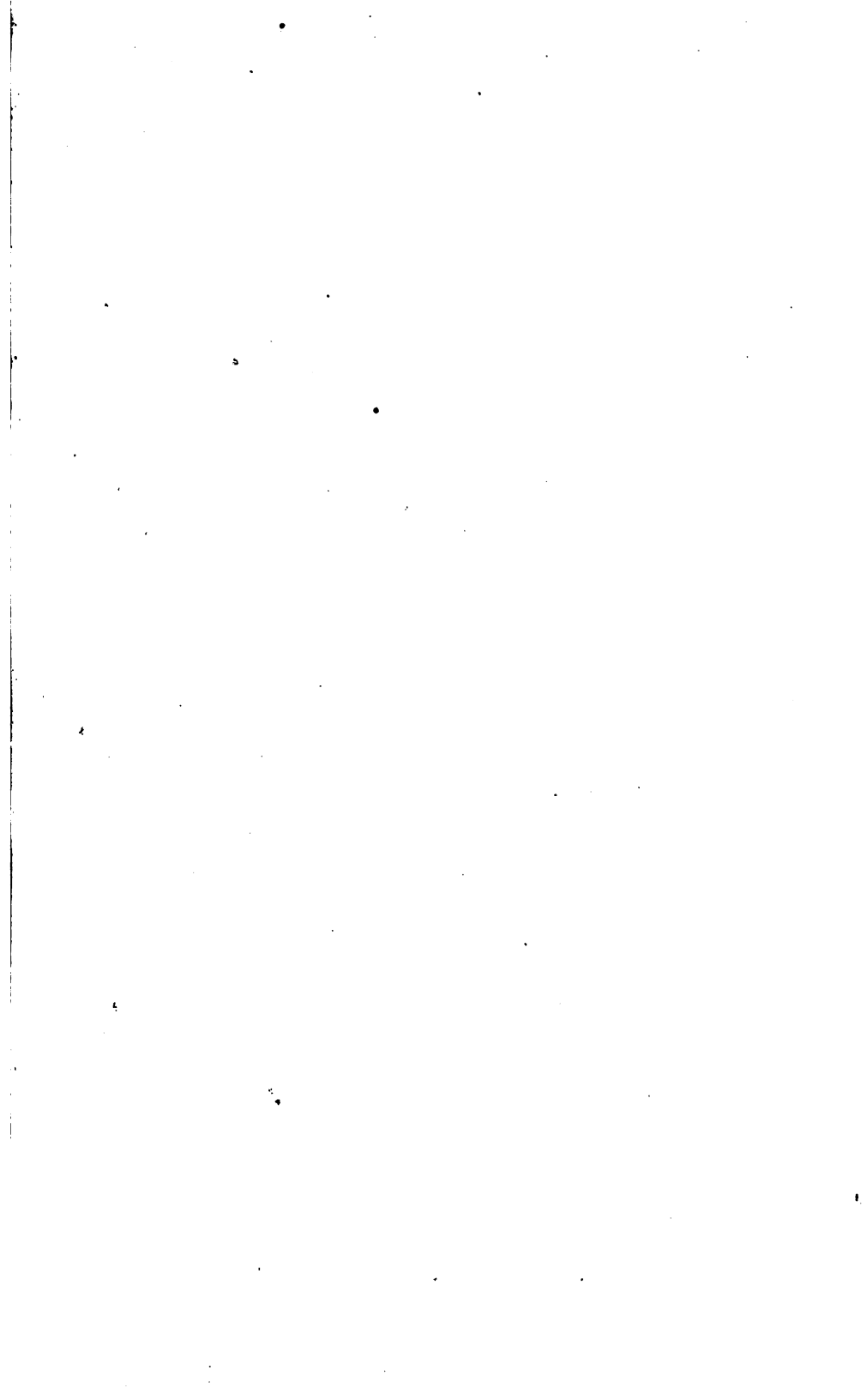
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H. H. Boardman

Presented by Mr. Birney,

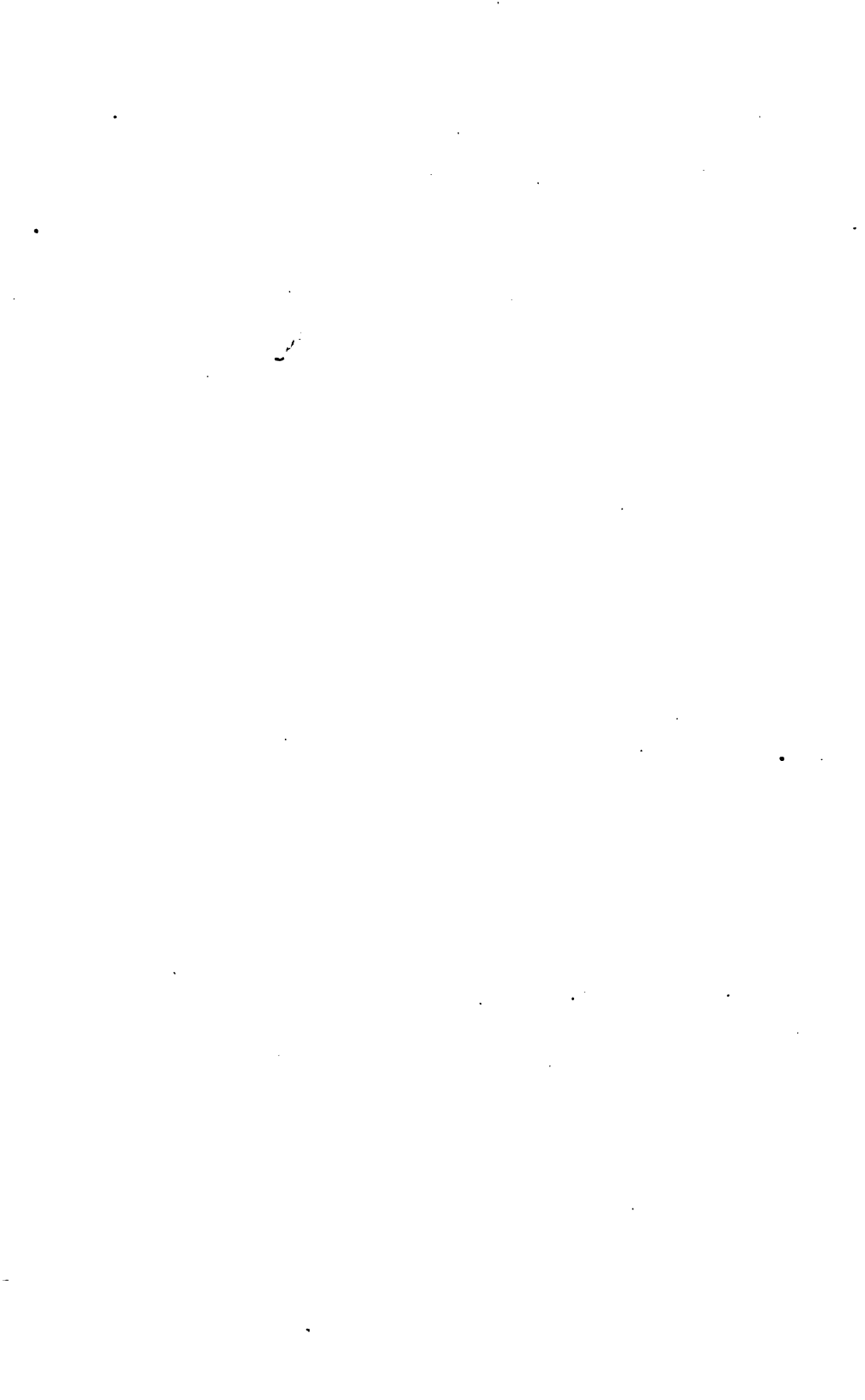
Oct. 3. 1853.















ARGUMENT

OF

HORACE BINNEY, ESQ.,

IN THE CASE OF

VIDAL *v.* THE CITY OF PHILADELPHIA,

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY, 1844.

PHILADELPHIA:

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THE general importance of the main question in *Vidal v. The City of Philadelphia*, may account for the fulness of the arguments of all the counsel who were heard upon the re-argument, and especially of that of the opening counsel for the City, which follows. The interests at stake in the State of Pennsylvania, in various trusts for charitable uses, can hardly be considered as secondary in magnitude, and they certainly are not in importance, to the trust under Mr. Girard's Will; and to extricate the latter from the objections made against it, upon any narrow ground, without defending, upon more comprehensive principles, the whole body of trusts for religious, charitable, and literary purposes, the blessing, honour, and glory of any people, might have involved a lasting evil to the community. It is known that a leading decision by the Supreme Court of the United States, in the year 1819, had led to the almost total overthrow of charitable uses in the States of Maryland and Virginia. It was worthy of any labour to counteract the further influence of that decision, by showing that in a great degree it proceeded from imperfect information, and the inaccurate *dictum* of an English chancellor, in regard to the original jurisdiction of Chancery over the subject of charitable uses. A like mistake as to the design of an Act of Assembly of Pennsylvania in 1731, menaced this State with similar consequences. To correct both the errors, which were historical in their character, required a history of the law both in Pennsylvania and in England; and this, if performed in a slight or perfunctory manner, was not likely to be of any decisive influence. The authorities were therefore stated to the Court much more copiously than is in general necessary; and they are repeated in the same way in this pamphlet, for professional reference. Until the close of the opening argument for the defendants, the case of the *Incorporated Society*

v. *Richards* in 1 *Drury & Warren*, was unknown to the defendants' counsel. Mr. Justice Story was then so obliging as to obtain the volume from the law library of Harvard College, and to allow them the opportunity of reading the case. Though an earlier knowledge of it, would have abridged the labour of preparation, it was highly satisfactory to perceive, that as far as the course of research in the two cases had been coincident, the argument for the defendants had the entire sanction of Lord Chancellor Sugden.

MR. BINNEY'S ARGUMENT

IN THE CASE OF

VIDAL ET AL. v. THE CITY OF PHILADELPHIA.

MAY IT PLEASE THE COURT,

With a perfect disposition to respect the recent injunction of the Court to the Bar, I shall proceed to the argument for the defendants, without any preliminary remarks. The great accumulation of business upon the calendar, is an unquestionable motive for the recommendation, so forcibly addressed to counsel a few days since by the presiding Judge, to study economy of time, and to aim at all practicable condensation and brevity in their arguments. I shall not be inattentive to the suggestion. But a very liberal expenditure is at times demanded by the wisest economy; and if it shall be found, as I fear it may, from the influence of a former decision of this Court—from the immense magnitude of the interests at stake—and from the almost elementary manner in which, to meet all exigencies, the questions must be discussed, that my own outlay offends against the letter of the recommendation, I hope it will also be found that it is in harmony with its spirit.

The proposition of the complainants is, that the trusts of Mr. Girard's will for the erection and endowment of the College for Orphans, are absolutely void; and they claim the benefit of resulting trusts to the heirs and next of kin, of all that is so devoted, as a necessary consequence of the invalidity of the trusts declared. The consequence is drawn too hastily. I shall endeavour to prove that they do not promote their claim in the slightest degree, by establishing the nullity of the trusts for the College. I shall of course endeavour also to show, that the trusts for the College are perfectly valid both in law and equity; and the support of these two positions will be the object of my argument, namely, 1. That if the trusts for the Orphan College are void, the legal result from other clauses in Mr. Girard's will, is, that the property,

real and personal, devoted to the College, enures to the exclusive use of the city of Philadelphia, for city purposes. 2. That the charitable uses declared in his will for the education and maintenance of poor white male Orphans, are perfectly valid in all respects. Under either aspect the bill was properly dismissed by the Circuit Court.

I. If the Trusts for the Orphan College are void, the legal result from other clauses in Mr. Girard's Will, is that the property, real and personal, devoted to the college, enures to the exclusive use of the City of Philadelphia for city purposes.

It becomes necessary to the argument on this point, to consider briefly the structure of the Will.

This instrument is divided into twenty-six sections, or clauses, distinguished by Roman numerals from I. to XXVI. The first eighteen sections contain the testator's bequests to local corporations, associations, or trustees, for charitable purposes,—to his relations, friends and dependents,—to all, it may be said, who had either the slightest claim upon his justice, or the feeblest expectation of his bounty. He was a widower and childless. He had devoted himself through a long life, principally to what is called business,—to the engrossing concerns of commerce, navigation, building, and banking. He must needs have so devoted himself, to have amassed his princely fortune. The influence of such a life upon a solitary man, might have ended at last, without surprising us, in the death of all the social affections, and in a sullen intestacy, distinguishing nothing by his remembrance, from loving nothing that he left behind him. There were not wanting persons, of that large class who are liberal with other men's money, and equally liberal of their censures to such as will not permit them to dispose of it, who thought proper to think and speak of him while he lived, as of a man in whom the love of money had deadened all the kindly affections. They did not know him. There were many proofs to the contrary during his life. His death has published an irrefragable proof to the contrary in his will. To the Pennsylvania Hospital—the Institution of the Deaf and Dumb—the Orphan Asylum—the Comptrollers of the Public Schools—the poor housekeepers and roomkeepers in the city, whose provision for fuel in the winter is the severest tax upon their small resources—his brethren of the Society of Free Masons—the poor children in the township in which his country seat was situated—the captains of his ships—his apprentices—his housekeepers—the members of their family—his old negro slave—all are remembered, and remembered in such a way, as to show the acuteness of his mind, as well as the strength of his feelings, in the kind of provision he makes for them. It is a striking, and to myself personally a most grateful evidence of the tenacity of his regard to those who deserved

well of him, that he gives a liberal annuity for life to the venerable widow of his faithful counsellor and friend my honoured master Mr. Ingersoll, who had departed many years before him. A memory so retentive of good offices, could not have been the companion of an insensible heart. The amount of these legacies, including the value of life annuities, does not fall short of one hundred and seventy thousand dollars, all of them tokens of regard, and of the most provident concern for the welfare of the legatees.

Among the complainants, and certain of the defendants, who comprehend all his heirs and next of kin that survived him, there is not one whom he has forgotten, nor one in whom he ever raised an expectation, that he has not more than answered. He distributed among them, in addition to his real estate in France, the sum of one hundred and forty thousand dollars in money, a munificent gift, if relation be had to any thing but that which was no merit of theirs, his own larger acquisitions. To one of three daughters of a brother, he gives sixty thousand dollars, to another and her child thirty, to another ten—estimating their several claims, and making distinctions between them, as he had an unquestionable right to do. All these legacies were paid, as the record shows, even before they were payable by law; and the complainants have taken, by the judgment of the law, a further sum of sixty thousand dollars, in the testator's after purchased lands, of which by accident or intention he died intestate.

Having thus received and enjoyed all that the Will gives them, and all that the testator did not take away from them by a republication of his Will, the complainants now claim the decree of this court, to defeat the great purpose of his life, and by an assault upon the very principles of charity, most fitly accompanied by an assault upon the character of their benefactor, to frustrate the two nearest and dearest wishes of his heart, and the two noblest objects upon earth, that living or dying, can fill the heart of any man, the instruction and succour of the fatherless poor, and the security, comfort and embellishment of a great city. It is a high moral as well as professional gratification, to assist in frustrating such a design.

After providing by the gift of more than three hundred thousand dollars for all private claims and expectations, the testator regards himself as free in every sense to indulge his preference of the two great public objects referred to. By the 19th section, he gives part of his Louisiana estates to the City of New Orleans, for the use of its inhabitants, and directs the remaining part to be converted into money, and to be applied to the same uses afterwards declared of the residue of his personal estate; and he then introduces the disposition of the residue, both real and personal, with the following recital:

“XX. And, whereas, I have been for a long time impressed with the importance of educating the poor, and of placing them,

by the early cultivation of their minds, and the developement of their moral principles, above the many temptations, to which, through poverty and ignorance, they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education, as well as a more comfortable maintenance, than they usually receive from the application of the public funds: and whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as a part of it, am desirous to improve the neighbourhood of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the eastern part of the city may be made to correspond better with the interior: Now, I do give, devise and bequeath all the residue and remainder of my real and personal estate, of every sort and kind, wheresoever situate, (the real estate in Pennsylvania charged with certain annuities,) unto 'The Mayor, Aldermen, and Citizens of Philadelphia,' their successors and assigns, in trust, to and for the several uses, intents and purposes, hereinafter mentioned and declared of and concerning the same, that is to say: so far as regards my real estate in Pennsylvania, in trust, that no part thereof shall ever be sold or alienated by the said Mayor, Aldermen, and Citizens of Philadelphia, or their successors, but the same shall forever thereafter be let from time to time, to good tenants, at yearly or other rents, and upon leases in possession not exceeding five years from the commencement thereof, and that the rents, issues, and profits, arising therefrom, shall be applied toward keeping that part of the said real estate situate in the city and liberties of Philadelphia, constantly in good repair, (parts elsewhere situate to be kept in repair by the tenants thereof respectively,) and towards improving the same, whenever necessary, by erecting new buildings; and that the nett residue (after paying the several annuities hereinbefore provided for,) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate. And so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Brumley, in trust, to sell and dispose of the same, whenever it may be expedient to do so, and to apply the proceeds of such sale to the same uses and purposes as are herein declared of and concerning the residue of my personal estate."

The testator distinctly declares by this section, that he has sincerely at heart, the welfare of the city of Philadelphia, *together* with the maintenance and education of the poor orphan. They are *together* the now remaining objects of his affection and bounty. He has already provided for all others that he meant to provide for, and excludes them by the clearest intendment from any thing more; and beginning with the residue of his real

estate in Pennsylvania, he orders the nett rents, issues, and profits to be applied to the same uses and purposes as are therein after declared of and concerning the residue of his personal estate. His Kentucky estate, he directs to be sold, and the proceeds of sale to be applied in like manner.

He then proceeds to the disposition of the personal residue.

“XXI. And so far as regards the residue of my personal estate, in trust as to *two millions of dollars* part thereof, to apply and expend so much of that sum as may be necessary, in erecting as soon as practicably may be, in the centre of my square of ground between High and Chesnut streets,” a permanent College with suitable out buildings, sufficiently spacious for the residence and accommodation of at least three hundred scholars, and the requisite teachers and other persons necessary to the institution, and in supplying furniture, books and all things needful to carry into effect the general design.

It is unnecessary to advert to the plan of his College, which he gives in great detail. As soon as it shall have been constructed and supplied, he takes up the unexpended balance of the two millions, and directs that “the income, issues and profits of so much of the said sum as shall remain unexpended, shall be applied to maintain the said College, according to his directions.”

Some of these directions will be noticed hereafter. The only clause connected with them, which it is now material to state, is the last paragraph of this 21st section.

“If the income arising from that part of the said sum of two millions of dollars, remaining after the construction and furnishing of the College and out-buildings, shall, owing to the increase of the number of orphans applying for admission, or other cause, be inadequate to the construction of new buildings, or the maintenance and education of as many orphans as may apply for admission, then such further sum as may be necessary for the construction of new buildings and the maintenance and education of such further number of orphans, as can be maintained and instructed within such buildings as the said square of ground shall be adequate to, shall be taken from the final residuary fund hereinafter expressly referred to for the purpose, comprehending the income of my real estate in the city and county of Philadelphia, and the dividends of my stock in the Schuylkill Navigation Company—my design and desire being, that the benefits of said institution shall be extended to as great a number of orphans as the limits of the said square and buildings therein can accommodate.”

This further sum beyond the two millions, is a provision for the College, expressly dependent on a double contingency. 1. That new buildings shall be necessary for a further number of orphans. 2. That the income of the remaining part of the two millions shall be inadequate to the construction of them, and the

maintenance and education of as many orphans as may apply for admission. In no other event, except these, is any thing beyond the two millions given for the use of the College; and these events were at the death of the testator, as they now remain, in all respects contingent, and must to some extent always so remain. Whether further buildings for the accommodation of further orphans will be necessary, and whether the income of the balance of the two millions will be adequate or inadequate to supply them, are among the most contingent of future events. When both contingencies shall happen, then and not till then, such further sum as shall be necessary for these purposes, "shall be taken from the *final residuary fund* hereinafter expressly referred to for the purpose."

The 22d section declares a trust of the further sum of 500,000 dollars, part of the residue of his personal estate, to be securely invested, and the income to be exclusively applied to the improvement known by the name of the Delaware Avenue.

The 23d section is a direct bequest of 300,000 dollars to the Commonwealth, for internal improvement by canal navigation, to be paid as soon as such laws shall have been enacted, as should be necessary to carry into effect the improvements in the 22d section, provided the said laws should be passed within one year after his decease.

The 24th section closes the disposition of his estate in the following manner:

"XXIV. And as it regards the remainder of said residue or my personal estate, in trust, to invest the same in good securities, and in like manner to invest the interests and income thereof from time to time, so that the whole shall form a permanent fund; and to apply the income of the said fund—"

"1st. To the further improvement and maintenance of the aforesaid College, as directed in the last paragraph of the XX1st clause of this Will."

"2d. To enable the Corporation of the City of Philadelphia to provide more effectually than they now do, for the security of the persons and property of the inhabitants of the said city, by a competent police, including a sufficient number of watchmen, really suited to the purpose; and to this end, I recommend a division of the city into watch districts, or four parts, each under a proper head, and that at least two watchmen shall, in each round or station patrol together."

"3d. To enable the said Corporation to improve the city property, and the general appearance of the city itself, and, in effect, to diminish the burden of taxation, now most oppressive, especially on those who are the least able to bear it."

"To all which objects, the prosperity of the city, and the health and comfort of its inhabitants, I devote the said fund as aforesaid, and direct the income thereof to be applied yearly and

every year forever, after providing for the College as hereinbefore directed, as my primary object. But, if the said city shall knowingly and wilfully violate any of the conditions hereinbefore and hereinafter mentioned, then I give and bequeath the said remainder and accumulations to the Commonwealth of Pennsylvania, for the purposes of internal navigation; excepting, however, the rents, issues and profits of my real estate in the city and county of Philadelphia, which shall forever be reserved and applied to maintain the aforesaid College, in the manner specified in the last paragraph of the XXIst clause of this Will: And if the Commonwealth of Pennsylvania shall fail to apply this or the preceding bequest to the purposes before mentioned, or shall apply any part thereof to any other use, or shall, for the term of one year from the time of my decease, fail or omit to pass the laws hereinbefore specified for promoting the improvement of the city of Philadelphia, then I give, devise and bequeath the said remainder and accumulations (the rents aforesaid always excepted and reserved for the College as aforesaid) to the United States of America, for the purposes of internal navigation, and no other."

The construction of the Will seems in general to be free from difficulty. Its meaning in some material points may be safely submitted to the court in the following propositions:

1. At the same time that the College and City are together the exclusive objects of the gift of all the testator's real and personal estate, after the legacies and devises in the first 19 sections, the primary object in the disposal of the income of the final residuary fund is the College *contingently*—and the city until the contingency happens. The College must first take the income to the necessary extent, *when* the contingencies shall happen, and the city is to take it *until* they shall happen. This is the consequence of devoting the fund to the prosperity of the city and the health of its inhabitants, to be applied yearly and every year forever, after providing for the College as *thereinbefore directed*, as his primary object.

2. The gift of the income of that fund to the city, subject to the contingency, is for her own proper corporate uses, the improvement of her police, and the diminution of taxation. If these are not lawful uses, her charter is a nullity. She can take nothing for any purpose.

3. The heirs and next of kin are intended to be cut off from every part of his estate, except what is expressly given to them. If the city violates the conditions of her gift,—the whole is given over to the Commonwealth of Pennsylvania for internal navigation, except the rents and profits of the real estate in the city and county of Philadelphia, which are reserved for the contingent extension of the College. If the Commonwealth violates the trust, or fails within a year to pass laws for the improvement of

the Delaware Avenue, the whole, with the same exception and reservation, is given to the United States for the like purpose.

4. The rents and profits of the real estate are not to be applied toward the payment of the two millions, nor of the 500,000 dollars for the Delaware Avenue, nor of the 300,000 dollars to the Commonwealth, although these trusts or gifts are declared of the residue of his personal estate, and his Will is express that the rents and profits shall be *applied* to the same uses as are afterwards declared of the residue of his personal estate. The vast amount of his true personal estate, made such an application unnecessary; but that is not the reason. The testator uses the words "residue of my personal estate" in two different senses; first, in the 21st section, as meaning the great mass of his residuary personal estate, before the 2,800,000 dollars were given; and secondly, as meaning *the final residuary fund*—the remainder of the residue spoken of in the 24th section. It is to the uses declared of *this residue*, that the rents of his real estate are to be applied. He places his meaning beyond doubt, in the last paragraph of the 21st section—by directing that the sum necessary for the contingent extension of the College, shall be taken from the *final residuary fund* thereafter expressly mentioned for the purpose, "*comprehending the rents and profits* of his real estate in the city and county of Philadelphia;" and also in those paragraphs of the 24th section, which give the said fund and its accumulations to the State and the United States in certain events, *excepting and reserving* in each instance, *the rents and profits of his real estate* aforesaid. The rents and profits of the entire residue of the real estate, in other words, the perpetual use of that real estate, is therefore given and to be applied precisely as the income of the final residuary fund is to be applied—namely, to the College contingently, and to the city absolutely, except when the contingencies shall accrue, and so long as they shall operate. It is an extraordinary perversion of the Will, to assert, as the complainants do in their bill, and also in their amended bill, "that no part or parcel whatever of the said residuum of the real estate is dedicated or in any manner devised or appropriated by the said Will to any use, purpose, or object whatever, but to the erection, establishment, and endowment of a College for the education of orphan children as aforesaid."

5. The great residuary devise and gift of the Will, the residuary trust of all the trusts declared in the 20th, 21st, 22d, and 23d sections, is to be found therefore in the 24th section. This is the proper residue of his personal estate, and is the rule of application for the rents and profits of the residue of his real estate. The bill itself avers that "the remainder and residue of his personal estate" is devised by the 24th section, while it makes the strange supposition, that the rents and profits of the real estate do not go in like manner.

6. An accumulation is directed in the 24th section, which is thought to make the gift to the city contingent, and to postpone her enjoyment until the College buildings are extended to the utmost capacity of the city square, and now of the substituted estate on the Ridge Road, and until orphans are maintained to the utmost capacity of the buildings that can be erected on it. This construction is untenable.

The direction of the testator is to invest the remainder of the said residue of his personal estate "in good securities, and in like manner to invest the interest and income thereof from time to time, so that the whole shall form a permanent fund, and to *apply* the income of the said fund," 1st, to the college contingently; 2dly, to the city for police; 3dly, to the city in diminution of taxation.

The period of accumulation is not prescribed. It is to be *from time to time*. The duration of it is a question of intention, to be collected from other parts of the Will.

The object is to make a *permanent* fund, by which he means a *fixed invariable fund*, the income of which is alone to be expended. If it is to be indefinitely accumulated, it must vary from year to year, and from day to day.

Investment is to cease, when application of the income begins: and application is to be made by the city *yearly and every year forever*.

The application is directed to be made by the city for *present* necessities. It is to enable the corporation to provide more effectually than they *now* do, for a competent police—to diminish the burden of taxation *now* most oppressive. To accumulate indefinitely, and to postpone application indefinitely, are contrary to the manifest purpose of this direction.

The application, it is true, is to be made "after providing for the College as *hereinbefore directed*:" but this provision is to be made for an actual demand, after a contingency shall have happened, and not for a prospective demand before. The College is provided for *prospectively*, by the maintenance of the permanent fund: it will be provided for *actually*, by taking the income when the actual contingent demand shall accrue.

The rents and profits of the real estate are not to be invested at all. They are to "be *applied* to the same uses and purposes" to which the residue of the personal estate is to be applied; and the application of the permanent fund of that residue is to be the *expenditure* of its income. The rents are to be applied for police and taxation, without any investment, after providing for the College as hereinbefore directed. This is the key to the clause of accumulation. The real estate was a permanent fund in itself. Its rents and profits were applicable immediately. The personal estate was to be for a year or more in a course of settlement in his Bank of between three and four millions, to be

wound up, and from time to time invested by the Trustees—in his outstanding shipments and adventures of merchandise, to be sold and converted into money by his Executors—and in the various items of his vast personal estate. While in this progress, though transferred from time to time to the city, he meant that it should not be consumed, but that the interests and income should from time to time be invested, until the fund of the personalty became permanently ascertained and established, in the same manner as the realty. When this should be concluded, application of the income of the personal was to begin. Such is the interpretation that has been always given to the Will by the city since the testator's death—and such is its true interpretation. It is imputing to the testator more than an absurdity, to say he meant indefinite accumulation for years and centuries, though not a dollar of the income may ever be wanted for further increase of buildings or orphans. It is imputing to him a gross defect of character, to which he was as much a stranger as any man that ever lived, the *hypocrisy* of appearing to provide for the city, while he was in reality ordering an inexorable accumulation for a college that might never want a dollar of it. If this was his design, why set apart two millions in the first instance? The argument of the complainants sets apart the whole residue, real and personal, *in secula seculorum*, for the same purposes as the two millions. That special appropriation, on the contrary, is the clearest proof imaginable, of the testator's present, instant purpose, of liberating the rest of his estate, until the increase of the College should require it, and to benefit the city by the immediate income of the residue, without prejudicing at his death, or at any future day, the confessedly nearer and dearer purpose of educating and maintaining the fatherless poor.

This construction of the clause of accumulation is submitted with great confidence.

The question, which after this analysis of the Will, will require little time to answer, is this: what is the necessary effect of the complainants' argument, if they shall succeed in the attempt to show that the charitable uses for the College are void?

1. As to the remainder of the residue.

The *permanent fund*, and the entire real estate, are to remain untouched forever: the income alone is to be applied. No part of this income is first to go to the College, before the city is to receive any thing, but the whole goes to the city, until the contingent demand for the College shall arise. There is no uncertainty about what the city shall receive, for she takes the whole income until the contingency shall happen. There is no division of the residue between the College and City *as tenants in common*—no appropriation of the residue to the College and City *in distinct shares*—no gift to the City after an uncertain amount is first *certainly* given to an illegal object, as in *Chapman v. Brown*,

6 Ves. 404; *Attorney General v. Davies*, 9 Ves. 535; *Limbrey v. Gurr*, 6 Madd. 151; *Attorney Gen. v. Hinxman*, 2 Jac. & W. 270. In one contingent event, the income as far as necessary, is to go to the College, and except in that event it is to go to the city. The complainants say, it is not lawful for it to go to the College at all. So be it. It then remains absolutely and forever to the city. Their argument is conclusive to defeat their claim to any part of the residue. If the gift to the College is illegal, then the contingency upon which it is to go to the College, can never happen. "The law will never adjudge a grant good by reason of a possibility or expectation of a thing which is against law; for that, by intendment of law, *nunquam venit in actum*." *Cholmley's case*, 2 Rep. 52. If the contingency can never happen, the city is residuary devisee of the whole for her own purposes. *Sprigg v. Sprigg*, 2 Vern. 394; *Bird v. Le Fevre*, 15 Ves. 589. The case is the same as if all were given to the city, subject to an illegal condition subsequent as to part. *Poore v. Mial*, 6 Madd. 32; *Tregonwell v. Sydenham*, 3 Dow. 210.

2. As to the two millions.

The law on this head is settled. A testator cannot in general die intestate of personal property, if he leaves a residuary legatee. Whatever lapses by death in the testator's lifetime, or is not sufficiently disposed of,—be it uncertain,—be it void—be it void as a charitable use,—falls into that residue. *Durour v. Motteux*, 1 Ves. 321; *Brown v. Higgs*, 4 Ves. 716; *Shanley v. Baker*, 4 Ves. 732; *Cambridge v. Rous*, 8 Ves. 25; *Dawson v. Clarke*, 15 Ves. 409. If the trust of the two millions is void, the final residuary trust receives it as it falls.

It is no answer to say, that the testator did not intend this, because he did not think or believe that the trust for the two millions would fail. He did not think or believe that any of his trusts would fail. What he meant, was, to make a final disposition of the remainder, as it might turn out to be eventually, under any circumstances contemplated or not contemplated. If the legacy of 300,000 dollars to the Commonwealth has failed—it must of necessity have fallen into this final residue. So if the 500,000 dollars for the Delaware Avenue had failed for want of laws to authorize that improvement. Such a residue comprehends personal property that the testator does not own at the time—property that specifically he could not have intended to pass. The question is not what he had in his contemplation, but what the words used will embrace according to their ordinary signification, which must prevail unless qualified by other expressions in the instrument. *Bland v. Lamb*, 5 Madd. 412; 2 Jac. & Walker, 399.

The only answer that can be given to this view of the case, has been given, namely that the rule does not apply where part of the residue itself is ill given.

It is admitted, that if a residue be given in shares, the failure of one share, does not augment the other. If the residue is given to tenants in common, or share and share alike, or equally to be divided, it is the same. *Bagwell v. Dry*, 1 P. Wms. 700; *Page v. Page*, 2 P. Wms. 489; *Cresswell v. Cheslyn*, 2 Eden 123.

The case of *Skrymsher v. Northcote*, 1 Swanst. 566, which has been cited, contains a fair illustration of the rule by Sir Thomas Plumer. "A part of the residue of which the disposition fails, will not accrue in augmentation of the remaining parts as a residue of a residue, but instead of resuming the nature of residue, devolves as undisposed of. Residue means all of which no effectual disposition is made other than the residuary clause. But when the disposition of the residue itself fails, the Will is inoperative. In the instance of a residue given in moieties, to hold that one moiety lapsing should accrue to the other, would be to hold that a gift of a moiety of the residue, shall eventually carry the whole."

I agree to all this, because in the event of part of the gift failing, there is no subsequent disposition made, that will comprehend what fails. In *Skrymsher v. Northcote*, the gift that failed, did not accrue in augmentation of the other share as a residue of a residue, because the will contained no provision for a residue of a residue. There was but one residuary clause, and all the dispositions made were of parts of the same residue. But in Mr. Girard's Will, there are two residuary clauses. The gift that is supposed to fail, is part of the first residue;—and there is a subsequent residue, a final residuary fund, which is expressly the residue of a residue—and therefore the gift of the two millions if it fails, does accrue in augmentation of the final residue, as a residue of the preceding residue.

A testator may direct his just debts to be paid, and dispose of the whole of his estate as a residue, and then bequeath—to A. one thousand dollars—to B. one thousand dollars—and again, all the residue to C. No one can doubt, that if A's legacy lapses, and if B's legacy is void, C. will take them as residuary legatee, and not the next of kin.

A will may have twenty residuary clauses. The first will be residuary to all that goes before the first. The last will be residuary to all that goes before the last. If any legacy before the first residuary clause, lapses or is void, it will fall into that residue; if any thing lapses that is subsequent to the first, it will fall into the next following residue. It is a mere question of testamentary intention and disposition, and not an artificial rule. Mr. Girard's last residue is that which follows the gift or trust of two millions; and if that fails by illegality, the final residue takes it up, just as the first residue would have taken any of the legacies in the first eighteen sections, that had failed for the same cause.

I submit, therefore, to the court, that the complainants' whole argument against the charity is suicidal. The only effect of it, beyond their own destruction, is to give the two millions, the final residue of the personalty, and the entire rents and profits of the real estate to the city, for her appropriate municipal uses, and to defeat, without the slightest benefit to themselves, the noble charity that their kinsman has instituted for the poor.

II. The charitable uses declared in the testator's Will for the education and maintenance of poor white male orphans, are perfectly valid in all respects.

This great question, involving the largest pecuniary amount that has perhaps ever depended upon a single judicial decision, and affecting some of the most widely diffused and precious interests, religious, literary, and charitable, of all our communities, is now to be brought to the test of legal research and reasoning. There was a period of time, covering the whole colonial existence of these States, when the validity of such uses as these, was taken for granted, and acquiesced in by the people every where. There was probably never a colony of English origin, that did not regard them as both morally and legally good, and hold them to be matters of conscientious duty, as well as of public policy. An Englishman of adult age, could not have left the land of his Christian forefathers, without bringing with him a reverential regard for charitable uses, and an inbred deference for all who desired to extend and to perpetuate them, whatever might have been his personal practice. The great scope of their design—in the sustenance of the poor, the instruction of the young, and the succour of the afflicted, under the vicissitudes that man is every where subject to—in the cultivation of learning, and the advancement of Christian knowledge—their tendency to consolidate and to adorn society in its progress—and their being moreover, under every shape and form, an acknowledgment, express or implied, of our duty to God, and to our neighbour, and directly or indirectly, acts of religious worship and gratitude—obtained for them in some form, and frequently in all forms, the consent of all the colonists. But they rested upon the habits and the feelings of the people, or upon adjudications elsewhere, and not upon principles investigated and declared by our courts; and hence it has happened, that after more than a century and a half of general adoption, the legality of charitable uses has of recent times been regarded by some persons among us as a prejudice, rather than a principle of law or equity, and as a well meaning weakness, that neither law nor equity is strong enough to support, without the sanction of legislative enactment.

The complainants' bill not only proceeds upon this assumption, but relies upon nothing else. If we look to it for such discriminations between charitable uses, as will leave the public in

the enjoyment of some, and deprive them only of others, we find nothing of the kind. It would have been some relief to ascertain, if those in the testator's will were thought to be defective, that by adding or subtracting some particular characteristics, we might with the complainants' consent, fall upon at least one class of charities, that had enough of suspended animation, to be resuscitated by a court of equity. But the complainants leave no such hope or expectation to the public. They give us no principle or rule by which we can discover, that in their judgment there are any redeeming characteristics of a good charitable use. They allege as fatal defects in the uses declared by Mr. Girard, properties that are not only common to all charities, but are inseparable from their very nature. They treat the whole institution of charities as an irremissible offence against the laws of property, whether legal or equitable, except so far, and only so far, as the legislature may have made a special enactment for the case.

It must be obvious to the court, that such an assault upon charitable uses, especially if it derives support from the judicial decisions of Virginia or Maryland, or from any thing that has ever fallen from any of the learned judges of this court, throws upon the counsel of the city of Philadelphia, an almost elementary investigation of this head of the law. The object is certainly of sufficient value to deserve it all; but it is quite remarkable, that at this time of day, we should have to maintain in this court, that a statute in England, or an act of the legislature in Pennsylvania, is not indispensably necessary to the existence of a charitable use.

I may be permitted then at the outset, to endeavour to clear away a part of the prejudice that seems to have embarrassed this subject, even in the minds of some enlightened judges.

One of the great objects of law in the transfer or transmission of property, from man to man, is no doubt, certainty of ownership, and except within well defined limits, immediate control over the entire absolute estate or interest in it. Whatever is not certainly owned by somebody, and is not within the limits referred to, disposable by its owner in full property, seems to be obnoxious to the objection of not being property at all. It is not merely a postulate of a court of law, it is equally so in general of a court of equity, that rights of property should be asserted only by ascertained owners, or on behalf of ascertained owners,—owners both for title and enjoyment. In the case of descent, or transmission by law, the law provides for the certainty that it requires; and if there is neither heir nor next of kin, it substitutes the representative of the nation through the process of escheat. In the case of transmission by act of the party, it denies all effect to the act, unless, within the prescribed limits, certainty of ownership is attained in both the respects alluded to.

The complainants' bill, taking up these general principles, and applying them to the charitable uses in the testator's Will, avers, "that the objects of the charity are altogether indefinite, vague, and uncertain, and no trust is created by the said Will that is capable of being executed, or of being cognizable at law or equity, nor any trust estate devised that can vest at law or equity in any existing or possible cestuy-que-trust;" and it asserts a resulting trust of the whole residue of the real and personal estate of the testator to the heirs and next of kin, "by reason of the same defect of definite and certain objects of the charities, for benefit of which the said devise was supposed to be made."

The bill further avers, that "the devise of the residue and remainder of the said real estate to the Mayor, Aldermen, and Citizens of Philadelphia in trust, is void, for want of capacity in such supposed devisees to take lands by devise,—or if capable of taking generally by devise for their own use and benefit, for want of capacity to take such lands as devisees in trust."

The amended bill repeats both averments with only a slight variation of language. "And your complainants maintain, that the Mayor, Aldermen, and Citizens of Philadelphia, were, at the death of the testator, incapable of executing any such trust, or of taking and holding a legal estate for the benefit of others; and that whatever may be the capacity of said Mayor, Aldermen and Citizens of Philadelphia, to hold property for the use of others, or to execute a trust, the objects for whose benefits the said devise in trust is supposed to have been made, are indefinite, vague and uncertain, as will appear from an examination of said Will; so that no trust is created that is capable of being executed, or is cognizable either at law or in equity, and no estate passed by said supposed devise, that can vest in any existing or ascertainable cestui-que-trusts; that if the objects or persons for whose benefit the said devise is supposed to have been made, were susceptible of ascertainment, yet such beneficiaries, when ascertained, would be wholly incapable of transmitting their equitable title in perpetual succession."

The allegation that the objects of the charity are *indefinite, vague and uncertain*—that no trust is created that can *vest* in any *existing or ascertainable cestui-que-trusts*—and that if the objects or persons were susceptible of ascertainment, yet such beneficiaries, when ascertained, would be *wholly incapable of transmitting their equitable title in perpetual succession*,—are so many appeals to the principle of certain ownership, and to the popular prejudice that charitable uses offend against it.

It is not against *present* vesting, that the objection is directed, but against the vesting of the charitable use *at any time*. It would be absurd to object to an use, that it does not vest at the moment of its creation—since nothing is better settled than that the whole beneficial interest of any estate, may be suspended,

and by a clause of accumulation placed beyond the reach of human enjoyment, as to both capital and income, for twenty-one years after the extinction of all lives in being. *Thelluson v. Woodward*, 4 Ves. Jr. 226. The objection means to deny that such charitable uses as the present can ever vest.

So as to the uncertainty of the objects of the trust, the bill cannot mean to allege, that poor white male orphan children, between the ages of six and ten, are *generally* uncertain, so that it cannot be ascertained from evidence, whether a male child comes within that general description or not,—but it means to allege as a fatal defect in the use, that no *particular* orphan child can at any time make good a personal claim to the benefit of the trust, as an individual intended by the testator.

In like manner, when the bill treats it as a fatal defect, that the beneficiaries when ascertained, will be *wholly incapable of transmitting their equitable title in succession*, it cannot mean that this transmissibility is necessary to all private estates, since it is notorious that life estates are never so transmissible, nor any estates less than estates for life, if the continuance of enjoyment is dependent upon life; but it must mean that there is an universal and inflexible rule of property, that in all estates and uses there is a period when the whole interest must be concentrated in one or more persons, and be transmissible to heirs or representatives.

Now I hold it to be demonstrable, that the statement of such objections against charitable uses, and especially those in Mr. Girard's Will, implies a misapprehension of the nature of such uses, and an equal or greater misapprehension of some of the best settled rules for the limitation of private property.

1. As to the uncertainty of the objects to take, and the mode of ascertaining them.

From the rule of law which permits a devise to remain executory for a life or lives in being and a certain period afterwards, it necessarily follows that there may be for the same period, in limitations of private property, an entire uncertainty as to the individual who shall ultimately take it: and by its also permitting a trust for accumulation for the same period, the enjoyment of the profits may in the meantime be tied up for the benefit of the same uncertain person.

By the operation of a power of appointment, equally established as a valid disposition of private property, it also follows, that within the same period, the particular person or persons to take, whether one, or several, or many, of a class or description more or less extensive, may not only be uncertain at the creation of the power, but continue uncertain during the whole life of the donee of the power.

In the case of a power to appoint an estate to all, every, or any of the children, grandchildren or issue of a certain marriage, intended to be celebrated, in such shares and under such restric-

tions, and in such manner as the donee of the power shall appoint by last Will, and in default of such appointment, to the use of A. B. in fee, the uncertainty of the person or persons to take at the creation of the power, and until the death of the donee of the power, is manifest. While the donee continues to live, there can be no irrevocable appointment. Whether one or more of the children, one or more of the grandchildren, or one or more of the issue more remote than grandchildren, shall take either together, or exclusively of others, depends upon the execution of an appointment by Will, and upon the death of the donee leaving the Will unrevoked. Ultimately they may be ascertained. But how? Not by the instrument creating the power,—not by the particular characteristics of the objects, whether children, grandchildren or issue,—but by the future appointment itself, selecting the object from the classes referred to, in such a manner as not to exceed the range of time allowed by law, nor the authority of the power itself.

Here the objects of the power may be regarded as *generally* certain—certain in point of class,—but as *particularly* uncertain—uncertain as individuals; and they are made individually certain by the execution of the power—namely by appointment.

This is not only an established, but a common limitation of private property for private uses, extensively and almost necessarily used in marriage settlements and in last Wills, both in England and in Pennsylvania; and what is the greater uncertainty of the objects of charitable uses, than of the objects of such limitations? None whatever.

In the present case, the trustees have the power of selecting the particular objects from a general class of poor white male orphans between the ages of six and ten. In all similar cases, whether there be trustees appointed or not by the founder, there are trustees supplied by chancery, to perform the trust, and to make the selection. This is the known and established office of chancery in cases of trusts, where there is no trustee appointed, or the appointed trustee fails. The selection or appointment by the trustee from the general class, ascertains the objects in particular; and when they are ascertained, where is the uncertainty of the equitable owner who is to enjoy? There is therefore no uncertainty as to the objects of charitable uses, be they poor orphans to be educated and maintained,—poor children of the township to be instructed in a free school,—poor widows—poor disabled seamen or soldiers, poor blind and lame, or poor of any other description, that cannot be made certain, and is not made certain, by the very method which the law allows to every man in disposing of his property for private uses. The objection that charitable uses are under a special difficulty in this regard, is therefore wholly unfounded.

But again. There is a class of these appointments to private

uses, in such close affinity with charitable uses, that they afford a still better illustration of the analogy, than the example I have taken,—I mean powers of appointment among relations, and poor relations.

In gifts to relations, and in cases of testamentary powers to appoint among them, if the appointment be not made, chancery distributes the gift, or executes the trust, under the guidance of the statute of distributions, giving the money to the next of kin. *Hardyng v. Glynn*, 1 *Atk.* 469; 2 *Sugd. on Powers*, 262–266.

Whether the word *poor*, prefixed to relations, has any effect in a case of gift, to narrow the distribution, has been made a question; and the better opinion has been stated differently by different writers. *Boyle*, 32; 1 *Powel on Dev. by Jarm.* 292–3, n. 3. In Pennsylvania it has been ruled to be of no influence. *McNeilledge v. Galbraith*, 8 *S. & R.* 45. But the donee of a power to appoint among relations generally, may select as appointees of the fund, any person or persons of known relationship, *though not next of kin.* *Grant v. Lynam*. 4 *Russ.* 292; 2 *Sugd. on Powers*, 262. Therefore, although in default of appointment, chancery confines the gift to the certain objects indicated by the statute, yet if there be an appointment, the donee may both exclude all who are made certain by statute, and select from the most uncertain, at the extremest limits of known relationship.

It is perfectly settled, moreover, that a power of appointment among poor relations, may be either a charitable use, or an ordinary limitation of private property, according to the intent of the testator, as shown by his Will. In general the rule is, that if the use is of the income, and intended for successive generations, it is a charity. If intended to be dissipated by an immediate distribution of the property, it is not a charity, unless there are expressions in the Will which leave no doubt. *Attorney-General v. Bucknall*, 2 *Atk.* 328; *White v. White*, 7 *Ves.* 433; *Attorney-General v. Price*, 17 *Ves.* 371; *Mahon v. Savage*, 1 *Scho. & Lefroy*, 111.

With reference then to these cases and distinctions, I ask, what is the difference, as to uncertainty of objects, between appointments among poor relations that are charities, and those which are not—between charities which the bill falls into the error of stigmatizing as uncertain, and limitations by way of power of perfectly lawful trusts of private property? As to the uncertainty of the particular objects before appointment, there is none whatever, they are identically the same, being members of the same general class. There is none as to the mode of ascertaining them—none as to the power of the donee or trustee to select by appointment—none as to the transmissibility of the power of appointment to the representatives of the donee or trustee—none as to successive executions of the power by either.

The transmission of the power to heirs or executors in the case of a private trust, is a mere question of intention in the instrument creating the power; *Mansell v. Vaughan*, *Wilmot's Notes*, 36: and successive executions of jointuring and mortgaging powers, and of all powers that are executed reserving a power of revocation, are indisputably valid. *Digges's case*, 1 *Rep.* 173; *Sir Richard Lee's case*, 1 *And.* 67; 1 *Sugd. on Powers*, 357. The difference lies in this, and only in this: 1. That charity may be permanent or perpetual; whereas a private limitation must exhaust the whole use within a life or lives in being and twenty-one years afterwards. 2. That charity is never transmissible to representatives, whereas finally in private limitations, the absolute interest must vest in somebody, with all the attributes of such an interest. Lord Redesdale, in *Mahon v. Savage*, selects this as a characteristic. All that the law has done for charitable uses, more than for private uses, is in authorizing a permanent or perpetual charity,—“*for ye have the poor always with you*,”—and in permitting perpetual successive appointments of limited interests, because no one man can claim to enjoy as charity, any thing more than the relief of his personal necessities. In all other respects, charitable uses ask nothing from Chancery, and obtain nothing, but what has been always accorded to private trusts.

2. As to vesting of interests in a charitable use.

Nothing can be more erroneous than the supposition that the equitable interest of the beneficiaries of a charitable use, does not vest. It vests precisely in the same manner as a use under a private power of appointment. What the duration of the vested interest of the beneficiary shall be, depends entirely upon the pleasure of the founder. It may be for life, for years, during good behaviour, or at the will of the trustees; but in all instances, though it be an interest or estate at will, it is from the time of appointment, a vested interest.

In some cases, the *schoolmaster* of a charity free school, has a freehold in his office, to which a right to the school-house and other property is attached. *Doe v. Gartham*, 8 *Moore*, 368; *Skelford*, 365, 366, 730.

He may have a middle interest, neither an estate for life nor at will, but during good behaviour, and until removed on notice by a majority of the trustees. *Wilkinson v. Malen*, 2 *Cr. & Jerv.* 636.

Even when removable at discretion, it cannot be exercised corruptly. *Dummer v. Corporation of Chippenham*, 14 *Ves.* 452.

Ministers of religion have in like manner vested interests of every variety of duration, according to the regulation of the founder, or if he makes no provision, according to the regulations of their church or congregation. A clergyman of the Established Church in England, holds for life. Among Dis-

senters, they often hold at the will of the congregation, declared in the manner provided by their society. Their tenure may sometimes be determined on notice; but Chancery does not lean hard in favour of so precarious a tenure, and it will always take care that the rules of the foundation are observed. *Attorney-General v. Pearson*, 3 Mer. 402; *Doe v. McKeug*, 10 Barn. & Cress. 721; *Attorney-General v. Jones. Shelford*, 765. (Note g.)

The *pensioners of a hospital* are commonly and with great propriety tenants at discretion; but although Lord Hardwicke inclined to think they might be removed by the trustees without a hearing, yet he would not give an absolute opinion. *Attorney-General v. Locke*, 3 Atk. 164.

The *scholars in a free school* have also the tenure which the rules of the foundation give them; and the trustees *must* nominate them when there are vacancies, and do it fairly and not corruptly, or Chancery will interfere. *Attorney-General v. Leigh*, 3 P. Wms. 146, note—*Shelford*, 769.

Mr. Girard's orphan boys have, upon appointment, a clear, vested right of maintenance and education, from the ages of six and ten to fourteen and eighteen, "*if they shall merit it.*" Their tenure is a term of years, "*si bene se gesserint.*" It is as firm a tenure as that of the judges in Pennsylvania.

It is worthy of remark then, that of three objections, made by the bill and amended bill against the charitable uses in this case, two of them, that the interests do not vest, and that the objects are uncertain, are, as general propositions in regard to all powers of appointment, unfounded in law; and the third, that the "beneficiaries are incapable of transmitting their title in succession," is an indispensable characteristic of every charitable use, and that which Lord Redesdale in *Mahon v. Savage* states as discriminating charities from all other uses.

I am, however, compelled still further to ask the court's attention to the elements of this doctrine of charitable uses. There is not a charitable society, nor an object of charity in Pennsylvania, nor an institution for the promotion of religion or literature, that is not to be affected by this decision. The magnitude of the estate in controversy, disappears before the magnitude of the public interests involved. It is indispensable that we look to our foundations with more than usual care.

We are told that these uses are *vague* and *indefinite*, and the attempt is made to press upon the court the adoption of the popular notion of them, by means of popular language. In an argument before a learned court, the effort should be to speak of legal things in legal terms,—to speak of that which has been adjudicated, in the language of adjudication, and not to confound all differences, by rejecting all established distinctions. Even a bequest to *charity* without more, though it is *general*, is

in no legal sense "vague or indefinite." It is good in England, and I trust in Pennsylvania too. The mode of administering it may be different from that of a gift to *trustees* for charity generally, or a gift to a more precise charity, *without trustees*; but it is not vague, it is not indefinite. It is comprehensive, but it comprehends nothing that has not the specific traits of charity, which I shall endeavour hereafter to point out. General charity, if there are no trustees, is administered in one way—if there are trustees, it is administered in another way: but nothing that is vague and indefinite can be administered at all. *Leg v. Asgill*, 2 *Turn. & Russ.* 265, note; *Vezey v. Jamison*, 1 *Sim. & Stu.* 69; *Moggridge v. Thackwell*, 7 *Ves.* 88.

A bequest to the *poor*, is one degree less general than *charity* at large; but it is neither better nor worse for that. The difference merely affects the administration of it. *Attorney-General v. Peacock, Finch*, 245; *Attorney-General v. Matthews*, 2 *Lev.* 167.

To the *poor of a particular parish* is still less general than a bequest to the *poor*; but it is still no better, nor if the mode of administration be excepted, is there any legal difference between them. *Woodford v. Parkhurst, Duke*, 378.

If, however, any charitable use is precise and not vague, limited and not indefinite, it is the charity founded by Stephen Girard, *an Orphan College for the maintenance and education of poor, white, male orphan children, from the ages of six and ten to the ages of fourteen and eighteen*, in the manner, and to the intents and purposes declared in his will. It is almost perfect precision. But it must not be understood, that we claim the least protection for it, on the ground of this precision, or shall offer a single suggestion to the court, that will distinguish it in point of favour above a charity to poor orphans generally,—to poor children—to poor seamen—to poor widows, or to the members of any class of the helpless, necessitous, or afflicted of mankind, however general may be the description. A distinction upon any such ground, mistakes the source, motive, end and objects of charity,—mixes up with its pure principle the grosser elements of exclusive rights,—endeavours to individuate the equitable interest, to fasten it in some way to the landmarks of private property—to make it the selfish thing that private property is—to require for it some characteristic that will give it the cast of personal possession, and a lawful title, by which one man may say to another, even of the same bereaved family,—“it is mine, and not yours.” The argument of the complainants demands for all charities that certainty and definiteness which are the badges of private right; and it probably will not be surrendered, until by rising up to the source of charity, it is shown that certainty in their sense, is its bane—that uncertainty, in the sense of the law of charities, is its daily

bread—and that the greatest of all solecisms in law, morals, or religion, is to talk of a charity to *individuals*, personally known to, and selected by, the giver. There is not, there never was, and there never can be such a thing, as charity to the known, except as “unknown.” Uncertainty of person, until appointment or selection, is in the case of a charitable trust for distribution, a never-failing attendant. If the trust be committed to a corporation for charitable uses, it makes no difference. Corporations for charitable uses are but bodies of trustees for uncertain beneficiaries; and their charities have no attribute of greater certainty, than if the trust were given to unincorporated trustees, or given for the object generally without trustees, when Chancery if necessary would supply them.

It has been said that the law of England derived the doctrine of charitable uses from the Roman Civil Law. Lord Thurlow has said it, and there are others who have said the same thing. It is by no means clear. It may very well be doubted. It is not worth the time necessary for the investigation. One of the worst doctrines, as formerly understood in England, the doctrine of *Cy-pres*, has been derived from the Roman law, and perhaps little else. Constantine certainly sanctioned what are called pious uses. A successor, Valentinian, restrained donations to churches, without disturbing donations to the poor;—and Justinian abolished the restraint, and confirmed and established such uses generally and forever.

But where did the Roman Law get them? We might infer the source, from the fact that Constantine was the first Christian Emperor,—that Valentinian was an Arian, a sagacious, bold and cruel soldier, but the tolerant friend of Jews and Pagans, and a persecutor of the Christians,—and that Justinian, “the vain titles of whose victories are crumbled into dust, while the name of the Legislator is inscribed on a fair and everlasting monument,” obtains, with this praise from the Historian of the Decline and Fall, the more enviable sneer, of being at all times the “pious,” and at least in his youth, the “orthodox Justinian.” We might infer it still better from that section of the code, which after liberating gifts to orphan-houses and other religious and charitable institutions, “*a lucratorum inscriptionibus*,” and confining the effect of these charges to other persons, concludes with the inquiries—“*Cur enim non faciamus discrimen inter res divinas et humanas? Et quare non competens prerogativa celesti favori conservetur?*”

What are *pious uses*? They are uses destined to some work of benevolence. Whether they relate to spiritual or temporal concerns,—whether their object be to propagate the doctrines of religion, to relieve the sufferings of humanity, or to promote those grave and sober interests of the public, which concern the well being of the people at all times,—all of them come under

the name of "*dispositiones pui testatoris.*" 2 Domat. 168, Book iv. Tit. 2, Sect. vi. 1.

They come then from that religion to which Constantine was converted, which Valentinian persecuted, and which Justinian more completely established; and from the same religion they would have come to England, and to these States, though the Pandects had still slumbered at Amalfi, or Rome had remained forever trodden down by the Barbarians of Scythia and Germany. I say the legal doctrine of pious uses comes from the Bible. I do not say that the principle and duty of charity, are not derived from natural religion also. Individuals may have taken it from this source. The law has taken it in all cases from the revealed will of God.

What is a charitable or pious gift, according to that religion? It is whatever is given for the love of God, or for the love of your neighbour, in the catholic and universal sense,—given from these motives, and to these ends,—free from the stain or taint of every consideration that is personal, private or selfish.

The domestic relations, it is not to be doubted, are most frequently a bond of virtue, as they are also the source of some of the most delightful as well as ennobling emotions of the heart. In the same class, both for purity and influence on human happiness, we may generally place the relations of kindred by blood or alliance, our friends and benefactors, those of whom we are a part, or who are an acknowledged part of ourselves. There is nothing in the Bible to sever any of these relations, if cultivated wisely, and in due subordination to greater duties; nor much, with perhaps an exception or two, to enjoin a special observance of them. One of them has the sanction of a commandment in the second table, to make children remember their parents, who need no command to remember *them*: and another is defended by injunctions, against infirmities, which while they are its cement, are often its ruin. All of them are deeply rooted in our nature. Instances are not wanting of their vivid influence between men whose nature is discoloured by the darkest stains; and without any emphatic sanctions in the revealed Word, they are perhaps more than sufficiently invigorated by natural impulses, which for good or evil rarely or never sleep. The feelings which attend them are not unmixed with benevolence—nay they are often deeply tinged with it; but benevolence does not bear supreme rule among them, nor is it their sole guide and governor. It is not to be forgotten by the Christian moralist, that although the ties which bind men together in these narrower relations, are necessary to their happiness, and therefore to their virtue, the due observance of the relations themselves is not that which the Gospel meant chiefly to inculcate upon man. Father and mother, son and daughter, husband and wife, master and servant, kinsmen, friends, benefactors and dependents,—while

such relations bind individuals together, they often break society into sections, and deny the larger claims of human brotherhood. They are an expansion, and sometimes little else, of the love of self. This is in many instances their centre and their circumference. The Gospel was designed to give man a truer centre, and a larger circumference; to wean him from self and selfish things—even from selfish virtues, which are “of the earth, earthy,”—to make the intensity of his self-love the standard of his love of human kind, and to build him up for Heaven, upon that which is the foundation of the law and the prophets, the love of God and the love of his neighbour.

Here are the two great principles upon which charitable or pious uses depend. *The love of God* is the basis of all that are bestowed for His honour, the building up of His church, the support of His ministers, the religious instruction of mankind. *The love of his neighbour*, is the principle that prompts and consecrates all the rest. The currents of these two great affections finally run together, and they are at all times so near, that they can hardly be said to be separated. The love of one's neighbour leads the heart upward to the common Father of all, and the love of God leads it through Him to all his children. The distinction between the two descriptions of charities, the doctrinal and the practical, or as they may with more propriety be called, the religious and the social, is one, however, that Christianity can hardly be said to enforce, since all its doctrines are practical, and all the charities it enjoins are religious; but it is of some moment in the law, as may hereafter be perceived.

But who is my *neighbour*? It was perhaps difficult to make a Jew, a Jewish lawyer especially, whose profession was not the best in the world to enlarge his heart—it might have been difficult for some teachers to make such a Jew understand that *he* was neighbour to a Samaritan, a schismatic, with whom the Jews “had no dealings:” but it was not at all difficult to make him confess, by the voice of his own self-love, that a Samaritan was neighbour to a Jew. A Jew whose brother had fallen among thieves, who had stripped him of his raiment, and wounded him, and left him half dead, was not slow to confess, that he that showed mercy on him, was his neighbour, even though he was a Samaritan.

Even the disciples of the Great Teacher, the fishermen from the strand of Genesareth, who from their station, and the vicissitudes of their calling, would seem to have been more than others in sympathy with the unprotected and unprovided of the earth, were not quick to learn this great lesson. An outcast from the coast of Israel, a Canaanite, who sought relief for her demoniac daughter, though she came with the strongest claim that humanity ever makes for sympathy and succour—a wretched mother imploring aid for her afflicted child—received from them nothing but “send her away, for she crieth after us.” The

sentiment in their hearts, their Master, preparing the lesson for them, seems to have put into words: "It is not meet to take the children's bread, and to cast it to dogs." But when the reply came—"Truth, Lord, yet the dogs eat of the crumbs which fall from their master's table"—the reproof of the misjudging disciples, and the restoration of the wretched demoniac, were conveyed by the same answer: "Oh woman, great is thy faith, be it unto thee even as thou wilt."

Lesson after lesson was designed to lead the Jew from the prejudices of his narrow family, to "all the kindreds upon earth," and to open his heart to even the proscribed Gentile, instead of suffering none to enter but those who held to him the personal relations, by which his own infirmities were cherished and confirmed—to lead him to imitate that celestial mercy which sends the rain upon the unjust, and "is kind to the unthankful and to the evil,"—to impel him, in fine, to love his enemies, and to do good unto all men, as his brethren of one descent from the same Father in heaven. "He that loveth father and mother more than me, is not worthy of me: and he that loveth son or daughter more than me, is not worthy of me." "My mother and my brethren are these which hear the word of God and do it." Such was the language of Christ to those who were prone to think, that the love of their own blood, or of their own nation, was the highest attainment of virtue.

The great final illustration of the principle of charity, is given as almost the last act of the ministry of Christ, when he prefigured the gathering of all nations, and the separation of one from another, as a shepherd divides the sheep from the goats. To those on his right hand the king shall say—"I was an hungry, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in: naked, and ye clothed me: sick, and ye visited me: I was in prison, and ye came unto me." And when the righteous, unconscious of this personal ministration to his wants, say, "Lord, when?" the answer consummates the lesson, and leaves it for the instruction of the living upon earth, as it is to be pronounced for their beatitude in heaven: "*Inasmuch as ye have done it to one of the least of these my brethren, ye have done it unto me.*"

It is not therefore in gifts to the beloved relation, the faithful friend, the personal benefactor, the personal dependent, the known, the individuated, whether beloved for merit, from gratitude, by personal association, or in reciprocation of good offices, that we are to look for acts of *charity*. These have their personal motives and their personal ends. We must go out of this narrow circle, where sometimes self-love is all that kindles our emotions, and perhaps always gives to them the warmth which we mistake for a nobler fire, into the larger circle of human brotherhood—the unrelated by any nearer affinity—the naked,

the hungry, the sick, the stranger and the captive—and must give to them, in humble reverence, and in faint imitation, of that divine beneficence, that gives every thing to us. This alone, in the sense of scripture, and in the sense of law also, is a charitable gift.

Nor is the extension of the hand to the wayside mendicant, or the administration of succour to the traveller who has just fallen among thieves near our path, or that occasional relief which feeling rather than principle prompts to the distressed who meet our eyes, a compliance with the duty which the Gospel enjoins. Provision for the day of need—accumulation for future necessity—a provident forecast for those who can have none for themselves—a preparation for our brethren under the Gospel, such as we should make for our children and brothers by blood—all these are not more the suggestion of reason, than they are the command of religion. The apostolical direction to the churches was distinct and reiterated. “Upon the first day of the week let every one of you *lay by him in store*, as God hath prospered him, that there be no gatherings when I come. And when I come, whomsoever ye shall approve by your letters, them will I send to bring your liberality unto Jerusalem. And if it be meet that I go also, *they shall go with me.*” St. Paul himself was a trustee for charitable uses, and by his injunction and example, gave the highest sanctity to both the charity and the trust.

It is by no means in the Gospel that this provision for the helpless and unknown is first announced, though it is there that the precept has its greatest expansion and emphasis. For whose benefit was the Jewish command, “When thou cuttest down thine harvest in the field, and hast forgot a sheaf in the field, thou shalt not go again to fetch it!” When the olive tree was beaten, for whose sake was the husbandman commanded not to go over the boughs again? For whom was the gleaning of the grapes, after the vintage was gathered? They were all for the unknown, the unrelated, the unfriended—the stranger, the fatherless, and the widow. “Thou shalt remember that thou wast a bondman in the land of Egypt. Therefore I command thee to do this thing.” “Thou shalt not glean thy vineyard, neither shalt thou gather every grape of thy vineyard. Thou shalt leave them for the poor and the stranger. I am the Lord, your God.” “For ye know the heart of a stranger, seeing ye were strangers in the land of Egypt.” The appeals are constant, reiterated, urgent—they are more than appeals, they are commands directly addressed to the Jews by the highest authority, and in the dread Name itself, to extend their gifts and their protection to the unknown stranger, the unfathered orphan, and the widow.

It is this command so clear, and sustained by such sanctions, to the Jews first, and afterwards to the people of all nations,

that makes charitable uses a matter of religious duty, so that to deny the performance or the enjoyment of them to any man, during his life, or at his death, or to withhold from them the sanction and protection of the law, is to deny him the exercise of one of the most sacred rights of conscience. Next to the worship of Almighty God, and as a part even of that worship itself, they are esteemed, and ever have been, as both a duty and a blessing. They were so promulgated to the Jews before the coming of Christ, and they were so taught and enjoined under the new covenant; and it is a miserable mistake, both of their origin and of their end, to question them for that uncertainty of particular object, which is of their very substance and essence.

It has been by no means my intention in these remarks to pronounce a homily to the court or to the counsel. It is not without some repugnance that I have blended themes of this nature with questions of law, in a strife for the recovery or defence of property. But they bear directly upon questions of law, and especially upon the great question, which I am now to discuss: for they disclose the foundation of charitable uses, and one of their inseparable attributes, in the manner most effectual to answer, not only the main argument of the complainants' counsel, but the judicial arguments which, in one or two cases in our own country, have unfortunately been used to defeat them.

In the Civil Law, and in the Law of England, all that I have said has been justified in repeated instances.

"The name of legacies to *pious uses* is properly given only to those legacies which are destined to some work of piety or charity, and which have their motives independent of the consideration which the merit of the legatees might procure them. Whereas, other sorts of legacies have their motives confined to the consideration of some particular person, or are destined to some other use than to a work of piety or charity."—2 *Domat*. 169, Book 4, Tit. 2, Sect. vi. 2. The author adds, "*It is in this motive,*" namely, a motive independent of the consideration of the merit of the legatees, "*that the essential part of legacies to pious uses does consist.*"

A gift intended exclusively as a *personal* gift to a minister, is not a charity; but if it is intended for him *qua* minister, as one of the class holding that office, or is not totally separated from the general object in reference to which he is personally to be benefited, it is a charity. *Greeves's case*, 1 *Ves. Jr.* 548, 2 *Cox*, 301, S. C.; *Attorney-General v. Cock*, 2 *Ves.* 273.

A beneficed English clergyman bequeathed £600 to the eminent Richard Baxter, to be distributed by him to sixty pious ejected ministers; and added, that he did not give it them for the sake of their non-conformity, but because he knew many of them to be pious and good men, and in great want. It was

held by Lord Keeper North, that this was a charity, but superstitious and void. *Attorney-General v. Baxter*, 1 *Eq. Ca. Abr.* 96. The decree was reversed in 1 *Will. & Mary* by the Lords Commissioners, for a reason that for a long time was not generally known. *Attorney-General v. Hughes*, 2 *Vern.* 105. In *Moggridge v. Thackwell*, Lord Eldon quotes Lord Hardwicke's note book:—"The case of Mr. Baxter upon Mayo's Will, the decree reversed; not upon any thing contradicting the general principle reported to have been stated, but because a legacy to sixty *particular* ejected ministers, to be named by Baxter; and as of a legacy to *those sixty individuals*," 7 *Ves.* 76; and therefore not a charity.

A gift to poor relations, if to be dissipated among such as are living, is not a charity; but if it contemplates a succession of them, and thus contains the element of uncertainty by comprehending the *unborn*, it is a charity. *Attorney-General v. Price*, 17 *Ves.* 371, *Boyle* 37.

A gift to the poor of the parish, is not a gift even to the certain poor on the poor rates, but to the uncertain poor, not receiving parish relief. The principle of the decision is not, it is true, that a gift to the poor on the poor rates is not a charity; but the courts have not availed themselves of certainty, even where they had it before them; but have established the trust for the least certain of the two descriptions. *Attorney-General v. Clark*, *Ambl.* 422; *Bp. of Hereford v. Adams*, 7 *Ves.* 324; *Attorney-General v. Corp. of Exeter*, 3 *Russ.* 395; *Attorney-General v. Gutch, Shelford*, 628.

A testamentary gift *pro anima*, is a charitable use of a very extensive nature, as will hereafter be shown; and yet a gift to a *father* or *mother pro anima* is not so, unless they are poor, that is to say, unless they come within the description of an uncertain class. *Lyndwode*, 180, *d.* 3 *Reeve, Hist. Engl. Law*, 80.

Mutually beneficial societies, whose members help each other in sickness or adversity, are not charitable societies. The motives and the ends are personal. *Babb v. Reed*, 5 *Raw.* 151; *Blenon's case*, *Sup. Ct. Penn.* April, 1843.

The only cases in which English Judges of eminence have been thought to fail in discerning the true principle of charitable uses, are *Morrice v. Bishop of Durham*, 9 *Ves.* 399, 10 *Ves.* 522; and *Brown v. Yeal*, 7 *Ves.* 50, note (a.) The first, decided by both Sir W. Grant, and Lord Eldon, is it appears to me perfectly defensible. It was a gift in trust for such objects of "benevolence and liberality" as the Bishop of Durham should approve; and the objection to it was, not that it did not include *objects of charity*, but that it included more, and was therefore bad for uncertainty of purpose. The trust was indivisible, and in part not a charity. *Liberality* it was said might include an exhibition of pictures, the establishment of a cabinet of natural history, or an

anatomical exhibition, as formerly the combats of gladiators were so considered. I do not admit that a trust for objects of benevolence and *liberality* would be sustained in Pennsylvania.

Brown v. Yeule arose upon a trust for purchasing and disposing of such books as might have a tendency to promote "the interests of virtue *and* religion, *and* the happiness of mankind," to be executed under the superintendency of such persons, and under such rules and regulations as Chancery should decree or order. It is difficult to see why this was not a charity of religion, in the established English sense. Lord Thurlow thought otherwise,—but it is clear that neither Sir W. Grant, nor Lord Eldon concurred with him.

In fine, the true characteristic of charity, is the certain purpose of relieving the poor and distressed, upon the principle of duty—the celebration or propagation of religious worship,—or the promotion of grave public interests, such as education, the suppression of crime and immorality, and the advancement of the general public weal, in modes and forms that embrace all classes of society. *Uncertainty of individual object* at the time of the gift, is a characteristic of charity, so that the personal or individual certainty which the bill requires, is fatal to it; and if there be any thing in the form of the donation to direct the gift to an individual, that individual must be bound up with a general class, so as to prove that the aim of the giver is general and not personal, or the gift becomes an ordinary disposition of property, and not a charity.

Having thus refuted the general principles, or rather the popular prejudices, which the complainants have stated in their bill, as objections to charities in general,—I come now to the particular consideration of the uses for the Girard Orphan College.

The complainants assail them on two grounds. 1. That the city has not capacity to take by devise, or to take such a trust in any way:—and therefore that the use fails for want of a competent grantee. 2. That the uses themselves are bad.

It is an abandonment of all that has been held in England from time immemorial, to make a point, that the incapacity of a trustee has any effect in equity to defeat the trust; but the objection may be readily answered upon other grounds.

1. As to the incapacity of the city to take by devise.

The English Statutes of Wills 32 H. 8, c. 1, and 34 and 35 H. 8, c. 5, never extended to Pennsylvania, nor had any operation within it, even for an hour. The exception of corporations, contained in the last statute, "The Statute of Explanations," is and always has been unknown to our law.

On the 25th of April, 1682, William Penn, while yet in England, established a frame of government for the province, and on the 5th May following, he, with certain of the purchasers under him, agreed upon certain laws, known among our collections as

"The Laws agreed upon in England," to be further explained and confirmed in Pennsylvania by the first Provincial Council that should be held, if they should see meet. 1 *Proud's Hist. Penn.* 196.

Law 15, is in these words: "That all Wills in writing attested by two witnesses, shall be of the same force as to lands, as other conveyances, being legally proved within forty days, either within or without the said province." *Weiss & Brockden's Edit. of the Laws, App. 1.**

The "*Great Law*" enacted at the first Assembly, held at Chester, (Upland,) on the 7th day of the 10th month (December,) 1682, which contains sixty-two chapters or laws, adopts the preceding law agreed upon in England, as chapter 45, and nearly in the same words: "That all Wills in writing attested by two *sufficient* witnesses, shall be of the same force as to lands as other conveyances, being legally proved within forty days, either within or without the province." *Weiss & B. App. 4.*

This law declared both the mode of proof, and the force and effect of a Will of lands. It contained no exception as to testator or devisee, or as to the quality or tenure of the estate. Whoever was competent to make or accept a conveyance of lands, was by force of this law, competent to make and accept a devise of them.

The law remained in force until the year 1700. On the 1st of June, 1693, it was described with other laws in a Proclamation of Gov. Fletcher, as not having been disallowed by the crown, and as then being in force generally. *Weiss & B. App. 7.*

The power of a testator over his estate within the province or territories, was in the meantime abridged by an Act passed in 1683, which, in case he left wife or children for whom an equal provision was not made elsewhere, gave one-third to the wife, and one-third to the children equally, and the other third "as the testator pleaseth;" and in case his wife was deceased before him, two-thirds to the children. *Weiss & B. App. 6.* But this restraint upon his power, was removed by an Act of the same date with Gov. Fletcher's proclamation, 1st June, 1693. *Weiss & B. App. 9.*

In 1700, the Governor and Assembly passed "An Act con-

* The copy of these laws in my possession has the imprint of "Philadelphia, Printed by Peter Miller & Co., 1762." It was examined by a committee of the Assembly, Joseph Galloway, Joseph Fox, and Thomas Leech; and by their report entered on the journals, which appears immediately after the title page, it is stated to have been printed by Lewis Weiss & Peter Miller, and compared with and corrected by the original rolls and records by the said Lewis and Charles Brockden, then Master of the Rolls. I have known it cited as Peter Miller's edition of the laws. A manuscript entry on my copy calls it Weiss & Brockden's edition,—and so I have cited it. It is valuable for several old laws not to be found in other editions, and especially for many of the proceedings in the Privy Council of England, repealing or disallowing certain of the Laws of the Province, according to the 7th section of the charter.

firming devises of lands, and validity of nuncupative Wills." It enacted "that all Wills in writing, wherein or whereby any lands, tenements, or hereditaments within this province or territories, are or shall be devised, shall be as good and authentic in law (according to the tenor thereof,) as any other conveyance for granting of such lands and premises, whether the said Wills be made within or out of this province or territories. Provided the same be legally proved within this province or territories within six months after the death of the testator, or within eighteen months, if the devisee live out of this government." *Weiss & B. App. 12.* This law was disallowed by Queen Anne, in council, on the 7th February, 1705. *Weiss & B. 18.*

Immediately after the disallowance, the Governor and Assembly passed the Act of 1705. "An Act concerning the probates of written and nuncupative wills, and for confirming devises of lands," which continued in force in all points up to the time of Stephen Girard's death. It enacts "That all Wills in writing, wherein or whereby any lands, tenements, or hereditaments, within this Province, have been, are, or shall be devised, being proved by two or more credible witnesses, upon their solemn affirmation, or other legal proof in this province, or being proved in the Chancery in England, &c., shall be good and available in law, for the granting, conveying, and assuring of the lands or hereditaments thereby given or devised, as well as of the goods and chattels thereby bequeathed." *Weiss. & B. 23; 1 Smith's Laws, 33.*

The objection made and repeated in the Bill, that the city cannot take by devise, is therefore altogether untenable, unless there is a restraint in the charter of the city; and there neither is now, nor ever has been any such restraint whatever. The charter by William Penn, dated the 25th of October, 1701, says that the Corporation "at all times hereafter, shall be persons able and capable in law to have, get, receive, and possess, lands, tenements, rents, liberties, jurisdictions, franchises, and hereditaments, to them and their successors in fee simple, or for term of life, lives, years or otherwise, and also goods, chattels, and other things of what nature or kind, without any limitation." *Weiss. & B. 11.* And the present Act of Incorporation, passed 11th March, 1789, says, "That they and their successors, shall at all times forever, be able and capable in law to have, purchase, take, receive, possess, and enjoy, lands, tenements, and hereditaments, liberties, franchises, and jurisdictions, goods, chattels, and effects, to them and their successors, forever, or for any other or less estate;"—also without limitation. *2 Smith's Laws, 463.*

Of as little weight as this objection, is another, that the city is incapable of holding real estate, by the statutes of *Mortmain*.

It is not admitted that the English statutes of *Mortmain* have, or ever had, any operation in Pennsylvania. There is neither

judicial decision nor legislative declaration to that effect, until the act of 1833, which was an occasional menace to foreign corporations interfering with the coal miners of Pennsylvania, and has too much of temporary policy in its aspect, to entitle it to consideration as evidence of the law. The opinion of the judges, who in 1808, reported certain of these statutes as extending, is a much higher authority—but it is still far short of judicial authority. No one goes before me in veneration for the excellent magistrate who was then at the head of the Supreme Court of Pennsylvania; and no one is better able to speak to his disinclination to the task allotted to him, for reasons which the report itself but imperfectly discloses. Nothing would have induced him to undertake the responsibility of the duty, but the critical position of the judicial department at that time, exposed for some years before to a strong popular effort to break it down, and from which, mainly by his appointment to office, it was then by slow degrees recovering. He was himself heard to say, that the weight of the report, did not exceed that of a respectable private opinion, conscientiously given, without the benefit of argument by counsel. It is not regarded as higher authority by any of the State tribunals. Statutes omitted in that report, have been held to extend, by subsequent judicial decision; and it seems impossible to imagine upon what ground the statute of 23 H. 8, c. 10, called a statute of Mortmain, but in truth only a statute against *superstitious uses*, has been held to have any operation in a community of universal religious toleration. If it was ever in force, it was undoubtedly repealed by the first constitution of the Commonwealth; and it was never admitted to be in force in the Colony, although the Crown intolerantly pressed upon the colonists, a doctrine drawn from its enactments.

No act of Parliament made before the settlement of the Province, was extended to it, unless by act of Assembly, adjudications of courts, or established usage; *Morris's Lessee v. Vandereen*, 1 Dall. 67; *Respub. v. Mesca*, 1 Dall. 73; and if it be true, as I suppose it to be, that there can have been no established usage extending the statutes of Mortmain, since there has never been a case of escheat or attempted escheat in Pennsylvania for a violation of them, then it must be admitted that all the grounds on which such extension can be asserted, have entirely failed.

The question is of too little importance in this case to justify an argument upon their general unfitness for any of the American colonies. The object of these statutes was entirely local, and their policy feudal. They were the fruit of aristocratic jealousy, or rather of an aristocratic passion for land, that has prevailed in England since the conquest and before. If Pennsylvania has adopted them, she alone has done so of all the States in this Union. 4 *Dane's Abridg.* 6, sec. 10; 2 *Kent's Comm.* 283. She is alone, among all those that have been colonized from

England. It is certain that Sir W. Grant held that they do not extend to Grenada, *Attorney-General v. Stewart*, 2 Mer. 143; and Lord Camden, when Attorney-General, gave his opinion that they do not extend to Jamaica. 2 Madd. Chan. Prac. 61, note q. I may adopt the argument of our learned opponent (Mr. Webster), who asserted their non-extension to any of the Colonies, in *Society v. New Haven*, 8 Wheat. 476. More decisive answers to the objection remain.

1. The statutes do not make void a conveyance in Mortmain, but only expose the land to forfeiture by the entry of the Lord or State. A corporation can without license take, though it cannot hold indefeasibly. *Leisure v. Hillegas*, 7 S. & R. 313; *Runyan v. Coster's Lessee*, 14 Peters, 122. The rule is the same in England. *Shelford on Mortmain*, 8.

2. These statutes do not, and never did, extend in equity to charitable uses. Mr. Cruise, in his digest, a work of great accuracy, says, "In consequence of the several statutes of Mortmain, all corporations have for a long time been incapable of taking lands by deed, without license from the crown: But as these statutes did not extend to charitable uses, lands might still be given for the maintenance of a school, hospital, or other purpose of that nature." 4 Cruise, 25, sec. 43; Title, *Deed*.

This is not the effect of 43 Eliz. as I shall show more at large hereafter. Sir Francis Moore is express—"If a feoffment be made to a dean and chapter to perform a charitable use, it is good, though they cannot be seized to another man's use." *Duke*, 133, *Bridgman's Ed.*; *Skinner's case*, 24 Eliz. Moor, 129; *Partridge v. Walker*, 37 Eliz. Duke, 360; *Messenger v. Mayor of Gloucester*, 36 Hen. VIII. Tothill, 58, are all to the same effect.

3. The charter of the city of Philadelphia, is an unlimited license to take and hold in Mortmain. This appears from the parts of the Act of Incorporation, which I have already cited.

The more strenuous objection of the complainants, is that the city cannot be a trustee; and it begins with the very doubtful position that a Corporation could not at the common law be seized to the use of another. But it has never been decided that such a seizin could not exist. There are dicta both ways. *Brooke's Abr.* 338, *Feoffment to Uses*, pl. 10, is in favour of it. The same book, 339, pl. 40, says that the better opinion is that a Corporation can take only to their own use. On the other hand it was said by the whole court in *Holland & Bonn's case*, 39 Eliz. 2 Leon. 121, 3 Leon. 175, that a Corporation may convey by bargain and sale. It was objected by counsel that a corporation could not convey by bargain and sale, because they could not be seized to the use of another; but the reporter says—"the court utterly rejected that exception as dangerous, for such was

the conveyance of the greater part of the possessions of monasteries."

Lord Bacon, whose *reading* is most frequently cited as an authority against the capacity of the Corporation, is very brief upon this point. He cites no authority whatever, though in other parts his essay is almost incumbered by them; and he is so illogical as to assign as his *chief* reason against the seizin, the letter of the statute of uses, "which in any clause in which it speaketh of the *feoffee*, resteth only upon the word *person*, but when it speaketh of the *cestuy-que-use*, it addeth *person or body politic*;" which, if it proves any thing, only proves that the statute would not in the case of a feoffment or other conveyance to a Corporation to uses, transfer the possession to the use, but would leave the use as it was before. Sir Edward Sugden has investigated the point with his usual learning and perspicuity in his edition of Gilbert. *Gilb. on Uses*, 7, note (1.)

The inquiry into this head of uses, however, is useless. It is an artificial question, in a very artificial chapter of the law, and at this time not of the least practical importance. The metaphysical disquisitions of our forefathers in the law, perplexed this head of jurisprudence with endless refinements and subtleties. "A thing that was neither *jus in re*, nor *jus ad rem*, nor a trust issuing out of land, but as a thing collateral, annexed in privity to the estate, and to the person touching the land," was very likely in due time to tie itself or be tied into knots, which nobody could untie, and which the sword of the statute was very wisely applied to cut. If contrary to the intention of the statute, trusts have been raised from the grave of uses, it must at least be agreed that in their new existence they are vastly more honest, more intelligible, more manageable than they were in their old. Lord Coke could argue in *Chudleigh's case*, that "it is absurd to say that confidence and trust can be reposed in land which wants sense, and which in regard of sense is inferior to brute beasts; and it would be less absurd to say that beasts may be trusted, who have sense and want reason, than that land should be trusted which wants sense and reason also;" 1 *Rep.* 127, *a.*: but that excellent faculty of common sense, and that great sharpener of it, long experience, have dismissed the argument as one of the "follies of the wise;" and in giving their confidence to land, more than to any thing under Heaven, and by fastening trusts to the land, Chancellors since the statute of uses have done more to give stability to property and to social happiness, than the metaphysics of the fifteenth and sixteenth centuries ever did before it.

With the exception of a short period after the statute of uses, the capacity of a Corporation to take a trust has never been doubted. Lord Bacon argued against it in the case of *Sutton's Hospital*, 10 *Rep.* 23, but Lord Coke says of his objections, that "they were not worthy to be moved at the bar, nor remembered

on the bench," and the Judges decided against them all. The grounds generally taken were, that there was no ground of confidence in an artificial person, and no mode of compelling the performance of the trust, and that it was not within the scope, nor for the end of the incorporation. There never has been a difficulty in regard to compelling performance by a Corporation since *Salmon v. Hambro' Company*, 1 *Cha. Ca.* 204, which was in 1670. Attachment and sequestration, whether of the individuals and of their property, or of the corporate estate, dismissal from the trust and substitution of other trustees, are enough, and there are none other in the case of private trustees. No end or scope of any Corporation can be perverted or disturbed by a trust. The corporators are individuals, and Chancery puts confidence in them as such, and deals with them as such; and their capacity of succeeding one to another, or in other words, the succession of legal trustees, is generally all that the trust derives from the Corporation, and this in no respect is an interference with the object of the charter. Wherever it does interfere, it may be a reason with Chancery for decreeing the transfer to a competent trustee. It is none for destroying the trust, or leaving it unprotected. Every Corporation like the City of Philadelphia can take, and that is sufficient. While they continue to hold for a valid trust, the trust cannot be wounded through their sides. Every such corporation has a sufficient power to hold, in order to support the trust at law, and that is an answer to an assault on their estate in any court.

The modern doctrine, that is to say the doctrine for two centuries, is clear to this effect.

"The modern doctrine of trusts differs perhaps in no instance so essentially from the system of uses, as in the construction of courts of equity, upon the capacity or liability of persons to act as trustees." 1 *Saund. on Uses*, 346.

"It was formerly held," says Cruise, but he does not say in what case, "that a corporation could not be a trustee; but the modern doctrine is that a corporation may hold in trust for itself, or for a third person." 1 *Cruise*, 403, *Tit. 12, Trust, Ch. 1, Sec. 90*.

In *Lydiat v. Foach*, 2 *Vern.* 411, Lord Keeper Wright held that a charitable corporation were but trustees for the charity; and he set aside a lease made by them contrary to a rule of the foundation, though the corporation had the title in fee simple. It is the case with all corporations, that they are but trustees for the persons interested under the charter.

In *The Haberdashers' Co. v. Attorney-General*, 2 *Bro. Par. Ca.* 370, the company, who were trustees under a devise for the poor, and the maintenance of a preacher, and had abused the trust, in keeping from the poor the full amount due them, and in selling the lands in which they had invested the gift, and keep-

ing the profit, the same Lord Keeper decreed the defendants, to set apart a proper amount of their own lands of inheritance, or to purchase as much as would answer the charity, and make up the loss. Lord Chancellor Somers, who had heard the cause in an earlier stage, was no doubt of the same opinion: and the decree was affirmed in the House of Lords.

The *City of Coventry v. Attorney-General*, 7 Bro. Par. Ca. 235, was the case of a city corporation, holding a freehold estate upon a comprehensive trust, in part for twelve poor men, inhabitants of Coventry, forever,—in part for young freemen of Coventry of good name, fame, and thrift, to be lent as a free loan for nine years, and then to be put out for such others—to continue in Coventry for forty-one years, and afterwards to circulate yearly between Coventry and four other towns, forever. The Corporation of Coventry abused the trust, and in consequence they were decreed by Lord Keeper Harcourt to assign the trust to other trustees, and to pay the moneys reported due from them. The trust was assigned, but the money not being paid, a sequestration issued against their estate, goods and chattels, which continued for seven years, when at length they raised money enough to pay the demand, and appealed to the House of Lords. The decree was affirmed; but so far were the Lords from holding that a city corporation could not be a trustee for the young freemen of four other towns, as well as of their own, that the decree was made without prejudice to the appellants applying to the Court of Chancery according to the course of that court, for a reconveyance of the trust estate as that court should think fit. And this was most clearly not within the statute of 43 *Eliz.*—for Coventry was a city corporate then, and had been for a long period before.

Perhaps a stronger case of the capacity of a city corporation to act as trustees for a charity that does not concern their city at all, is the case of *Attorney-General v. City of London*, 3 Bro. Ch. Rep. 171. The Honourable Robert Boyle, by his will, dated 18th July, 1691, directed that the residue of his personal estate should be disposed of by his executors for such charitable and pious uses as they in their discretion should think fit, but recommended them to lay out the greater part for the advancement of the Christian religion. The executors agreed to lay out £5400 in the purchase of the manor of Brafferton, in the county of York, with a view to grant a rent charge of £90 out of it, to be paid to the corporation for the propagation of the gospel in New England, and parts adjacent, for religious instruction in New England; and subject to that charge to convey the estate to the city of London, in trust, that the surplus rents should be applied to the advancement of Christianity in Virginia, as the Earl of Burlington and Bishop of Durham for the time being should direct. In 1695, the Court of Chancery decreed that the

Manor should be so conveyed to the city of London, and the conveyance was made; and after the Revolution in America, which, in the opinion of Lord Thurlow, had terminated the former scheme of charity, he ordered the master to propose a new scheme—still continuing the trust in the city of London.

The effectual manner in which Chancery deals with a corporation trustee, is shown by *Dummer v. The Corporation of Chippenham*, 14 Ves. 245. The bill stated that the Corporation was seized of a messuage, in Chippenham, and also of two rent charges secured on lands within the borough, for the support of a free school, for the education of twelve poor boys born in the town, and that the appointment of the schoolmaster was in the bailiff and a majority of the burgesses: and that the plaintiff had been regularly appointed to that office, and had held it for many years. The bill further stated, that the plaintiff had been deprived by a resolution of the bailiff and a majority of the burgesses, in consequence of a scheme formed and entered into for that purpose, by five of the defendants, in which number the bailiff was included, and in which scheme they were actuated by resentment and party spirit against the plaintiff, in consequence of a vote given by him at the last election for members of Parliament, against their wishes, and not by any view to the benefit of the charity. The bill prayed that the bailiff and burgesses might, in their corporate capacity, answer the matters in the usual way, but that the five defendants particularly named in the bill, might answer upon oath; and prayed for relief and an injunction. The five defendants demurred, on the ground that no title to the discovery was shown against them. Lord Eldon, said, "If these persons, trustees of a school for a charitable purpose, were acting as individuals, this court would have no difficulty in dealing with them, and there is no doubt the court will compel a corporation who are trustees, to act as they ought." "A corporation, as an individual, with such a power over an estate devoted to charitable purposes, would in this court be compelled to exercise that power, not according to the discretion of this court, but not corruptly. A trustee of either description, a corporation or an individual, cannot be permitted to act corruptly in the execution of a trust." "The question upon this case is, whether this court can entertain a bill against these individuals as parties, to obtain a discovery, whether through their means so manifested, there was such an abuse of the discretion vested in the corporation, as this court will reform. Upon the whole, my opinion is, that this is a case, in which the court will call upon individuals under such circumstances for an answer." Demurrer overruled.

The capacity of a corporation universally to be a trustee, has now passed into an elementary principle. 1 *Saund. on Uses*, 349; *Willis on Trustees*, 31; *Lewin on Trusts*, 10, 11; 2 *Thomas Co.*

Litt. 706, note; *Penn v. Lord Baltimore*, 1 *Ves.* 453; *Attorney-General v. Foundling Hospital*, 2 *Ves. Jr.* 46; *Green v. Rutherford*, 1 *Ves.* 467. No matter who are trustees, the power of the court operates on them as trustees; and though a collegiate body, will compel them to execute it as private persons, and will dismiss them if they abuse it. *Attorney-General v. Clarendon*, 7 *Ves.* 499; *Attorney-General v. Utica Ins. Co.*, 2 *Johns. Chan. Rep.* 389.

This rule is a necessary consequence of well settled principles. No deed or devise is absolutely void, where there is a capacity to grant and to take, unless a statute declares it so. The common law has no such effect. What then is the necessary consequence of a devise to a corporation capable of taking, even though incapable of executing the whole trust? Certainly it is that the corporation is nevertheless a trustee—a trustee for some purpose, and not the absolute owner—a trustee to convey the legal estate to such as *can* execute the trust, or as are entitled to it. The argument of the claimants has the rare consistency of denying that the city can take in trust, and at the same time asserting that the court is bound to decree that the city is a trustee for them. If the city would be a trustee for them if the trust were bad, she must be a trustee for others, if the trust is good. The question is the validity of the trust, and not the capacity of the trustee. If a debt, secured to a corporation by mortgage, or pledge, or deed of trust, is paid, is it not extravagant to say that the creditor is not a trustee of the security for the debtor? Is it not absurd to say so in a court of equity? Is the trust to perish in this court, the foster-mother and nurse of trusts? No, the principle is necessarily and universally true, that whoever owns the legal estate for a trust distinct from that ownership, be it corporation or private person, be it capable or incapable of executing the trust in all points, is a trustee for the equitable owner—a trustee to protect the trust—a trustee, at all events, to transfer the estate to such as will and can protect it.

All this is said, and it is a sufficient answer to the complainants' exceptions, without advertng to the peculiar position of the city in regard to the trusts for the Orphan College. The trusts of Mr. Girard's Will have a particular relation to the corporate powers and interests of the city. They directly and immediately promote the objects of the corporation; and therefore the power of executing them cannot be denied, whatever may be the general rule.

The City of Philadelphia is a great Commonwealth; and the powers of the Corporation, for her good and the good of her citizens, are under no restraint but that of not violating the constitution and laws of the State. The Mayor, Aldermen and Citizens "have full power and authority to make, ordain, constitute and establish such and so many laws, ordinances, regulations

and constitutions (provided the same shall not be repugnant to the laws and constitutions of this Commonwealth,) as shall be necessary or convenient for the government and welfare of the said city." Act of March 11, 1789, 2 *Smith* 162. This power extends to all the declared objects of the charter, "the suppression of vice and immorality, the advancement of the public health and order, and the promotion of trade, industry and happiness." The maintenance and education of her poor orphans, is an object entirely cognate to all the recited purposes. It is the duty of every such city. In the *Mayor v. Elliott*, 3 *Raw.* 170, the point was settled by the Supreme Court of Pennsylvania. The city holds and executes under that decision a trust for the indigent lame and Blind of Philadelphia and its neighbourhood. This decision concludes the matter. It is no longer an open question. A like power, for affinity of object, was held to belong to a school corporation in *Trustees of Phillips' Academy v. King*, 12 *Mass.* 546. A church corporation without doubt may be a trustee for the distribution of bread to her poor. *Witman v. Lex*, 17 *Ser. & Raw.* 89.

The City is moreover by Mr. Girard's Will, a trustee for her own citizens, to the extent of the whole of his vast estate, after providing for the Orphan College. The legal estate is irrevocably vested in them for that purpose at least. It can never be taken from them; and if the execution of the orphan trust is regarded merely as the price which the Corporation pays for the benefit to the city, it is a duty properly assumed.

And finally, all controversy on the point is precluded by the sanction and confirmation which have been given to the performance of the trusts by the city, in the two Acts of the Legislature of Pennsylvania, of 24th March and 4th April, 1832. *Ordinances of Corp.* 93, 98. The last act authorizes the Councils of the City "to provide by ordinance or otherwise for the election or appointment of such officers and agents as they may deem essential to the due execution of the duties and trusts enjoined and created by the Will of Stephen Girard." This is equivalent to a direct previous authority. *Society v. Town of Pawlet*, 4 *Peters*, 502. If there is any defect in the charter, any want of authority in the Corporation to assume this new responsibility, by which the corporate estates may be prejudiced, and which a court of chancery might regard as requiring a transfer of the trust, this Act is an answer to it. It is of no avail to argue that the *substratum* of the trust in this case is the corporate character of the city—that if that fails, the trust itself fails—and that if the city could not execute this power at the instant of the testator's death, she never can subsequently acquire the power from any source, so as to revive the trust for the charity. The argument is incomprehensible. If it be meant that the trust fails if the city cannot take, and that this was Mr. Girard's intention, it is an

inference without either a word in the will, or a principle of equity, to sustain it. There is not a clause of the trust that cannot be executed by a court of chancery itself, or by persons appointed by it. The case of the *Attorney-General v. Whorwood*, 1 *Ves.* 534, has no application. That case decided, if we can gather what it did decide, that a charitable use was wholly void, because the principal use that was the foundation of the whole, and was inseparable from the rest, was void,—namely a devise of the surplus of the testator's personal estate and of his house at Denton, to be occupied forever by a fellow, who was to live hospitably therein, and sometimes to give entertainment to the poor, to distribute cordials and drugs to them when needful, and to give them some books and pamphlets of good morals and piety. It was objected that this was not a charity at all—that the testator meant only to perpetuate his name, house and furniture, and that the regulations appointed by him were contrary to the Constitution of University College, so that the gift of the real estate failed, and of the personal as dependent upon it. To make it applicable, the Chancellor should have held part or the whole of the use to be void, because the *legal estate* was bad, or the *legal capacity* of the trustee deficient. That would have been a case of the first impression. It would have been in direct conflict with all that was ever held before, or has been since held, upon the subject. In *Sonley v. The Clock-Maker's Company*, 1 *Bro. Cha. Rep.* 81, where a devise of real estate to the Corporation was absolutely void under the statute of Wills, and the trust in remainder was to sell and distribute the proceeds among the nephews and nieces of the testator, so that it was not a case to be assisted by favour to charities, nor by the 43 *Eliz.*—the court said the trust was fastened to any estate the law would raise on failure of the trustee; and the heir was decreed to be a trustee to the uses of the will. If a testator shall hold this language, that if the Corporation to whom it is devised, cannot take his estate, and execute it in all and every point and particular, by the corporate powers she possesses at his death, then the trust shall cease to exist and be extinguished, I will not say that his absurd wish may not be carried into effect; but short of that, I deny that the legal estate can in equity be regarded as the *substratum* of the use, in any such sense as by its own failure to destroy the use. The notes to *Attorney-General Whorwood*, in *Belt's Supplement*, seem to leave it doubtful, whether Lord Northington held the trust of the real estate to be void, under 9 *Geo. 2, c. 36*, because the College could not take the use, and the bequest of the personal to be void, as a dependence, or whether the whole charity was bad, as only "*ad bibendum et edendum.*" The former is the most probable; and certainly if the College could not take under the exception in that statute, the devise of the real estate was void by the enacting clause.

Having thus turned aside these assaults upon the legal estate, I come to the main question—the validity of these charitable uses; and the positions I shall endeavour to maintain, are the following:

I. That such uses as these in Mr. Girard's Will, are good and lawful uses by the common Law of England, which is the common law of Pennsylvania.

II. That the city being in complete possession, nothing more is necessary. The city wants no remedy, either at law or in equity; and it is of no present importance, therefore, whether such a remedy can or cannot be had, when it is wanted.

III. That such trusts are, however, entitled to protection in equity, upon the general principles of equity jurisdiction, which protect all lawful trusts, whether there be a trustee or not.

IV. That they in fact enjoyed this protection in Chancery, before the 43d of Queen Elizabeth, by the original jurisdiction of that court, and have enjoyed it ever since.

V. That the 43d of Elizabeth is an ancillary remedy only, long since disused in England by reason of its inconveniences, and supplied by Chancery, not as an usurper upon the statute, but as the rightful original tribunal for such trusts.

VI. That whatever the 43d of Elizabeth imparted to the law of charities, be it more or be it less, except the mere remedy by commission from the Lord Chancellor, or Lord Keeper, has been thoroughly adopted in Pennsylvania from her earliest day, together with the great body of the equity code of England; and that the same is true of nearly all the States of this Union, who have adopted the same principles, and abide by them in their adjudications.

1. Such uses as these in Mr. Girard's Will, are good and lawful uses, by the common law of England, which is the common law of Pennsylvania.

This may be shown by historical proofs, by the opinions of learned jurists, and by judicial decisions.

HISTORICAL PROOFS.—Charitable uses preceded uses of land by several centuries. The latter first became common in the reign of Richard II., which began in 1377; but they are referred to as existing in Ireland in the reign of Edward II., which began in 1307, and certainly existed in 1334, the 8th of Edward III. 3 *Reeve*, 171. They have little in common with *pious uses*, and the latter are never confounded with them, but to the effect of producing spurious opinions. Charitable uses were settled at common law long before the earliest of these dates, and doubtless from the first dawn of Christianity in England. Books of reports did not speak of them at that early day, for there were no such books. The year books begin in regular series only in the reign of Edward II.; but charitable uses were established in

one remarkable form, before, and long before that time, by the devotion of all intestate personal property to them, except the reasonable parts of wife and children. If a man made no disposition of the part that was *testable*, the king by the *old law* took the goods as *parens patriæ*, and general trustee of the kingdom. Afterwards in favour of the church, the trust was committed to the *prelates* as of better conscience than laymen, and knowing best what pious uses would benefit the soul of the intestate.

The trust of the Ordinary, was to dispose of them *ad pias causas*, in other words to *charitable uses*; though the author of the Commentaries on the Law of England, took so narrow a view of the subject, as to hold that this meant "in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious." 2 *Bl. Comm.* 494, 492; *Perkins*, sec. 496; *Glanville*, l. 2, c. 5. The meaning of this language extended much farther.

That the uses were sometimes what a Protestant would call *superstitious*, may be admitted; but besides charity to the poor, the words included many charities of the same kind which the statute of 43 *Eliz.* expressly sanctions; and indeed the description in that statute is but an expansion of the old rule in intestacy. The Provincial Constitutions, which, with the consent of the realm, ruled this matter, and especially the Constitutions of Archbishop Stratford, ordained the distribution of the intestate goods to be made "*ad pias causas, et personis decedentium consanguineis, servitoribus, et propinquis, seu aliis, pro defunctorum animarum salute.*" Any person who was an object of compassion, an orphan, widow, or pauper, destitute of support from himself—those rendered infirm by disease or age, being also poor—the watching of a city—the repairing of bridges, roads, walls, and ditches of a city or castle—the ornaments and fabrics of churches—lights, anniversaries, and incidents relating to divine worship—these were all included under *piæ causæ*. 4 *Reeve*, 80. Lyndwood, who was official principal to Archbishop Chicheley—1414 to 1443—expresses them all. *Lyndwode's Provinciale*, 180, d.; 4 *Reeve*, 117.

A gift *pro anima*, which is so generally, with a sneer like Blackstone's, put down to the account of superstition, was of the same description, and applied in like manner as a gift *ad pias causas*, that is, it comprehended large and liberal charities. 4 *Reeve*, 80.

Gifts *pro emendandis forefactis et pro male ablatiis*, that is, for atonement of injuries, were deemed to be of the same kind, and were disposed of in like manner. *Ib.*

Though this was canon law, it was also the law of England, "*per consensum regis et suorum procerum ab antiquo;*" and by the statute 25 *H. VIII.* c. 19, sec. 20—the authority of these

canons and constitutions, not being repugnant to the laws of the realm, was continued in force after the Reformation, until they should be revised by a commission authorized by that statute—which revision never took place; so that the distribution *ad pias causas*, continued to be the rule in intestacy, except where special custom ruled otherwise, until the statutes of distributions, 22 & 23 Car. 2; 29 Car. 2, c. 30.

Even children got nothing of this intestate part, except as charity; and they were postponed to the poor and to several other pious uses. The order of distribution was: 1. *Ad pias causas*, comprehending all the particulars I have stated. 2. *Consanguinei*, children first, then lineal descendants, then collaterals, according to proximity. 3. The widow. 4. The *propinqui*, either by blood or neighbourhood. 5. The *alii*, who were again the poor, first already provided for. *Lyndwode*, 180, b. i. k.; 4 *Reeve*, 81.

Damus's case, *Moore* 822, 12 *Jac.* 1, 1614, is a strong case to show the force of this rule. An administratrix of her first husband, made a Will after her second marriage, by which she bequeathed a debt belonging to him, partly for a charitable use, and partly for other objects. After her death, the debt not having been collected, administration *de bonis non* was granted to the estate of the first husband. The next of kin applied to the prerogative court to cancel the administration, and to give it to them; and the Judge made the parties compromise the matter, and agree to distribute the debt among the kindred of the first husband, and the kindred of the first administratrix, giving nothing to the charitable use. Commissioners under the 43d *Elizabeth*, established the charitable use, and their decree was excepted to in Chancery. Lord Ellesmere confirmed the decree, on the ground that the children and kindred had no title in such a case, but by way of charity, and that the priority belonged to the charitable use. His language is this: "The goods in the hands of the administrator are all for charitable uses, and the office of the ordinary and administrator is to employ them in pious uses. The children or kindred have neither property or pre-eminence, but under the title of *Charity*, and the preference ought not to have been given to the kindred of the creditor before the charity, and still less to the kindred of the administratrix."

It thus appears, that a systematic distribution to charitable uses, of the same description as those in the statute of 43 *Eliz.* was the rule of the common law in the case of intestate personalty. That it was abused by ordinaries and administrators, is probable enough, but such an objection is futile. The principle was there, grounded and rooted in the constitution of the common law; and it would be idle to ask whether a testator could have lawfully devised to charitable uses, the part that he might dispose

of by will, when if he made no will, the law disposed of it in that way.

But further, the principle, and even the form of charitable uses, was engrafted upon the *old English tenures* of real estate.

By the ancient common law, a man could not alien lands which came to him by *descent*, without the consent of the *heir*; but he might give a part of them in *frankalmoin* or *free alms*. *Co. Litt.* 94, *b.* Littleton says "such tenure first began in *old time*;" and he died in 1481. *Litt. Sec.* 133.

The charitable use in this tenure, was to pray for the soul of the donor or his heirs if dead, and for their prosperity if living. *Co. Litt.* 95, *b.* 96, *a.* *Litt. Sec.* 136.

The donee was obliged of right to perform this use; and the remedy, if it was not performed, was before the ordinary, or special visiter if one were appointed, unless the king was the giver, and then it was in Chancery; but it could not be remedied by *distress*, because the amount was not certain. *Litt. Sec.* 136, *Co. Litt.* 96, *a.*

Tenure by divine service, another of these tenures begun in *old time*, was of this sort;—"as to say mass for the soul of the giver every Friday—or, to distribute in alms to an hundred poor men, an hundred pence on such a day." *Litt. Sec.* 137.

Here is a charitable use open to all the objections of the complainants' bill. If any charitable use can be called "vague, uncertain and indefinite," such as "no existing or possible person can have a vested right in, either at law or in equity," it is this. No one of the hundred poor men could be ascertained except by selection and payment, and yet this was certain enough for an old English tenure. It had moreover four remedies at law: distress and avowry by the lord, *Co. Litt.* 96, *b.*; a *contra formam collationis* under *Stat. Westminster* 2d, 13 *Edw.* 1, *c.* 41, 2 *Inst.* 456; a *cessavit* by the lord under the statute of Gloucester, 6 *Edw.* 1, *c.* 4, to recover back the lands, if the alms were withdrawn for two years: 2 *Inst.* 456, 2 *Inst.* 295: and covenant upon the deed. *Fitz. N. B.* 483. The charity was a perpetual trust; and the tenant could not prevent judgment in the *cessavit* by tender, because the alms belonged to the poor, and not to the lord of whom the land was holden. 2 *Inst.* 460, (13.)

There were many tenures of the same kind, that is to say by *divine service*, to which different charities were annexed. Lord Coke enumerates some of them in *Bruerton's case*, 6 *Rep.* 2, *a.*—to show, that by reason of the favour extended to them, if the lord purchased parcel of the land, yet the whole service remained; as "if one holds to marry a poor virgin yearly: *quia opus charitatis*:" or "to find a preacher in such a church, or to provide the ornaments of such a church: *quia opus devotionis et pietatis*." He repeats the same in *Co. Litt.* 149, *a.* adding the

case of a tenure *pro opere charitatis*, "to bind a poor boy apprentice." Brooke in his abridgment extends the cases still further. "If a man, before the statute of *Quia Emptores terrarum*, had made a gift of land in fee to repair a bridge, or to guard a castle, or to marry annually a poor virgin of S, this is a tenure, and the donor may distreyn and make avowry, and it is not a condition." *Bro. Abr. 2d part. 261, Tenures 53.*

Charitable uses have therefore these clear marks of their validity, in the history of the common law, that they were the only objects of distribution in cases of intestacy, and were the support of two English tenures, which Littleton says began in old time.

Look now at the respect shown to them in several of the old English statutes, the *declaratory law*, most plainly recognising them as valid, and as worthy of all favour.

One of the most striking of these statutes, is of a date as early as 1324, the statute 17 *Edu. II. Stat. 3. De Terris Templariorum*, 1 *Pick. Stat. 385.*

The military order of Templars, having for good or bad reasons been suppressed in 1312, their lands, which were held of the king and divers other lords in the kingdom by the services of relieving the poor, maintaining hospitality, celebrating divine service, the defence of the Holy Land, and other services, were seized into the hands of the king and other lords of the fees, who challenged the lands, that they ought to revert to them as their escheats. Whereupon in a Parliament held in the 17th year of the king, "great conference was had before the king himself, in the presence of the prelates, earls, barons, nobles and great men of the realm, and others there present, whether the foresaid lords of the fees, or others which held the lands that were the foresaid Templars', as is aforesaid, might retain them by *the law of the realm*, and *with safe conscience*. Whereupon the greater part of the king's council, as well the justices as other lay persons being assembled together, the said justices affirmed *precisely*, that our lord the king and others, lords of the fees as aforesaid, might well and lawfully by the *laws of the realm*, retain the foresaid lands as their escheats:" but they answered nothing as to the "*safe conscience*:" and then the statute proceeds to say, that "it seemed good to our lord the king, the noblemen and others assembled in the same parliament, for the health of their souls, and *discharge of their consciences*, that whereas the said military order of Templars was originally instituted for the defence of Christians, and the universal holy church, subversion of the enemies of Christ and Christians, and canonized to the augmentation of the honour of God, and liberal alms-giving, the said lands, according to the wills of the givers, shall be assigned and delivered to other men of most holy religion, to the intent the fruits, obventions and profits of the same, may be converted and charitably disposed to goodly uses;" and thereupon the statute enacted that

all the lands which were of the Templars at the time of their dissolution, should be assigned and delivered to the order of the brethren of the Hospital of Saint John of Jerusalem, to be held by the same services by which the Templars held the same, "as in relieving the poor, in hospitalities, in celebrating divine service, defence of the Holy Land, and in all other offices and services beforetime due, by whatsoever names they be called, so always that the godly and worthy will of the foresaid givers be observed, performed, and always religiously executed."

Another proof may be drawn from the uniform course of the English Parliament, in prosecuting the two great controversies which successively engaged the attention of the Crown, from the beginning of Henry III. to the reign of Elizabeth—Mortmain and Superstitious Uses.

The religious houses drew too much land away from feudal services, for the pre-eminence of the nobility and of the king. Superstitious uses strengthened too much the power of the Church of Rome and her clergy, for the security of the Reformation. Assaults, increasing in vigour and severity, were successively directed against them both, until they fell; and when they had fallen, it was not difficult to perceive among the ruins, the wreck of many noble charities, by which the kingdom had been relieved from the burden of the poor, one of the heaviest which the civil administration has since had to sustain; and which in a state of separation from the principle of charity, it has never effectually sustained either for the payer or the receiver.

Until after this memorable contest had continued to nearly the end of Henry the 8th's reign, there was no legal provision for the poor. None was made, because none was required. The religious houses endowed for charitable, or if the name is preferred, for superstitious uses, were in substance alms-houses for the poor, hospitals for the sick, and schools for all the learning of the times. These charities were dispensed in connexion with religion, and as parts of a religious administration. The religion with which they were connected may have been bad—that is a point that I do not discuss—but the working of it in this respect was good; and it is most certain, that a purely civil administration has never since been able to do it with half the efficacy to the poor, nor with a tithe of the convenience to the public. The principle of charity has been sacrificed in the change, and the Christian bond between rich and poor, almost irrecoverably broken.

The Parliament of England was never insensible to the good which they were impairing, while they were undermining what they thought was bad. There was never at any time an enmity on their part to these charitable uses for succour and instruction. The Lords and King wanted to sustain their own revenue and

power, and the king finally, for his own reasons, determined to maintain his supremacy. The incidental effect of disturbing charitable uses, they at all times regretted, and endeavoured to obviate. Whether their endeavour was effectual, it is not material to this cause to consider; but it is material to show, that the proceedings of Parliament during the contest, furnish irrefragable evidence of their favour and sanction to charitable uses, and of their desire to sustain them for the public good.

I mean to give the statutory history only, because it is of a character to hold a place in an argument upon the law of charitable uses.

The last Mortmain statute aimed at the religious houses, was the statute of 15 *Ric. II. c. 5*, in 1391. This statute compelled them to amortize their lands by the licence of the Lords and King, before the feast of St. Michael then next, or to sell them to some other use, on pain of forfeiture.

At the end of a hundred and seventy years from the 9 *Hen. III.*, when the attack may be said to have begun, the evil to the poor from this legislation came to be seriously felt—and the very next statute, 15 *Ric. II. c. 6*, contained a provision, though a feeble one, in alleviation of it.

It enacted that in every licence henceforth made in Chancery, of the appropriation of any parish church, it should be expressly contained, that the diocesan should order, according to the value of such churches, a convenient sum to be paid yearly of the fruits of the churches, by those that have the churches in proper use, and their successors, to the *poor parishioners of such churches, in aid of their living forever. 2 Pick. Stat. 314.*

An appropriation is the perpetual annexation of a living or advowson to a spiritual corporation; and this statute was therefore an order by Parliament, that every spiritual corporation should hold the parsonage house, the glebe and the tithes, thereafter acquired, charged with a charitable use for the poor of the parish.

Eleven years afterwards, in 1402, the statute 4 *Henry IV. c. 12*, followed up the design of the previous statute, by annulling all that had been done contrary to it, and by enacting that in every church to be appropriated, a secular person should be ordained vicar perpetual, “canonically institute and induct in the same,” and conveniently endowed at the discretion of the Ordinary, to do divine service, to inform the people, and to keep hospitality there.

Twelve years after this, in 1414, the statute of 2 *Henry V. ch. 1, 3 Pick. 8*, sets forth a true but frightful picture of the dilapidation into which charities had fallen.

“Forasmuch as many hospitals within the realm of England, founded as well by the noble kings of this realm, and lords and ladies, both spiritual and temporal, as by divers other estates, to

the honour of God and his glorious mother, in aid and merit of the souls of the founders, to the which hospitals the same founders have given a great part of their moveable goods for the building of the same, and a great part of their lands and tene-ments, therewith to sustain impotent men and women, lazars, men out of their wits, and poor women with child, and to nourish, relieve, and refresh other poor people in the same, by divers persons, as well spiritual as temporal, are withdrawn and spent in other use, whereby many men and women have died in great misery for default of aid, living and succour, to the displeasure of God, and peril of the souls of such manner of spenders"—the statute proceeds to order a commission of inquiry by the Ordinary, of all hospitals of the king's foundation, returnable into *Chancery*, and as to other foundations, that they should be corrected and reformed by the Ordinaries themselves. Here is the first *commission of charitable uses*, and its design, like the last in 43 *Eliz.*, was not to create, but to restore them.

The civil wars of England which immediately succeeded, had little effect to build up charities. For the time, they supplied occupation for the poor, but finally multiplied their numbers and their miseries.

When Henry VIII. began his assault upon the supremacy of the Pope, the increase of the poor, and the abuse and decay of charitable uses, had not yet obtained direct parliamentary redress; but the statute of superstitious uses in the 23d of his reign, would appear to have accelerated the crisis.

The statute 23 *Henry VIII. c. 10, 1531, 4 Pick. 239*, was a political measure, adopted before all possibility of reconciliation with the Church of Rome was at an end, but with a purpose on the part of the king, to bring on a separation of the churches, if he should not bend the pontiff to his will. It was intended to serve as a menace, while at the same time, in case of need, it would admit of explanation; and hence the doubt that long prevailed, whether its equivocal language did not destroy, and was not meant to destroy, good charitable uses, as well as superstitious uses, if they were made to an association or company of men. It was not until the 14th November, 1532, that the king was privately married to Anne Boleyn, nor until the 25th of his reign in 1534, that his supremacy was declared by Parliament. His laws, upon all subjects connected with religious property, became after that event remarkably explicit.

The effect of 23 *Henry VIII.* was however to beget an universal distrust, to deter every one from making fresh donations to charitable uses, and to encourage them in plundering as far as they could in privacy, such as had already been instituted. The consequence was that four years afterwards, in the 27th of the king, Parliament had to pass the *first poor law* of England, 27 *Henry VIII. c. 25, 1535, 4 Pick. 387*; a horrible evidence of

the barbarity of the times,—for the statute ordered the beggar who was able to work, to be whipped back to the place where he was born, or had last lived for the space of three years, there to get his living by compulsory labour, and if he repeated his offence, to have the gristle of his right ear cut off, and for the third offence to be adjudged and executed as a felon. Miserable transition from the charity of the religious houses, to the charity of the law! Miserable necessity, if it was a necessity, of abandoning the succour of the poor and the sick, by considerate, reflecting, religious charity, and of assuming it by the State as a public, political burden!

Henry busied himself little during the rest of his reign with building up any thing. In the 37th year he made his fatal assault upon the religious houses, which left little more to be done in this way. 37 *Henry VIII. c. 4, 5 Pick. 219.*

His son, a young prince of more tender conscience, did not confine himself to completing the ruin of the monasteries and charities, but looked with strong emotion at the mischief that was involved in it, and endeavoured in part to repair it. By the 11th and 12th sections of an Act passed in the first year of his reign, “The Act for Chantries Collegiate,” 1 *Edw. 6, ch. 14, 5 Pick. 267*, commissioners were ordered to inquire what money or profit any poor person or persons, by conveyance, will or otherwise, had or enjoyed out of any college, free chapel or chantry, seized to the use of the king; “and thereupon to make assignments and orders in such manner, as that all such said money profit and commodity should be paid to poor people forever, according to such assurance, composition, will, devise, or other thing had or made for the same, and to appoint lands for the maintenance and continuance of the same forever; and also to appoint to fraternities, brotherhoods and guilds, lands, tenements and hereditaments, towards and for maintenance of piers, jetties, walls or banks, against the rages of the sea, havens and creeks”—another head of charitable uses, as has been shown. And also if the priest or incumbent of the chantry ought to have kept a grammar school or preacher, to assign lands for the maintenance of a preacher or schoolmaster, to remain and continue in succession forever, for and towards the keeping of a grammar school or preaching, and for such *godly intents and purposes*, and in such manner and form as the commissioners should appoint. Lord Eldon has declared his opinion that one great object of this statute, in dissolving chantries, was the purpose of instituting free grammar schools. It is the highest evidence that such schools were previously of indisputable validity as charities. *Attorney-General v. Earl Mansfield, 2 Russ. 522, Boyle 263.*

Another section puts this duty to the commissioners with the deepest solemnity of language, as the highest of religious obligations. “The said commissioners and every of them that shall

take upon him the execution of any of the said commissions, shall be bound, as they will answer before God, to execute the commission to him and them directed, beneficially towards the poor people, concerning the said assignments, and also towards the maintenance of piers, jetties, walls or banks, against the rages of the sea, havens and creeks." *Sec. 13.*

A statute of the 2 and 3 *Edw. 6, c. 5*, shows that the decay of charitable uses had become a crying evil; for the king had by this statute to surrender his own fee farms for three years, to remedy it—requiring them to be bestowed about repairing of walls, bridges, setting the poor on work, *or other good deeds.* 5 *Pick. 299.*

The succeeding reign of Mary, while it undid a large part of what her father and brother had done, did not disturb the charities which had thus survived the downfall of the religious houses. On the contrary, the 1 *Phil. & Mary c. 8*, in 1554, 6 *Pick. 34*, which restored the Church of England to Rome, recites "that after this reconciliation and unity of this noble realm to the body of Christ's Church, it is to be trusted, that by the abundance of God's mercy and grace, devotion shall increase and grow in the hearts of many of the subjects of this realm, with desire to give and bestow their worldly possession for the *resuscitating of alms*, prayer, and example of good life in this realm, to the intent such godly motions and purposes should be advanced;"—and enacts, that lands to any extent may be given to spiritual corporations without license for twenty years thereafter, and that the donors may reserve a tenure in *frankalmoigne* or a tenure by *divine service*, and have all remedies and actions for and upon the gifts or devises and tenures, in like manner and form as was used before the statute of *Quia Emptores terrarum.* *Sec. 51 to 54.*

This, however, was not sufficient to meet the evil. Queen Elizabeth had to walk in the same path. In 1597—the 39th of her reign—the Parliament authorized any person or persons seized of an estate in fee simple, their heirs, &c., by deed enrolled in Chancery, to erect and endow hospitals, *Maisons de Dieu*, and abiding places or houses of correction, as well for the sustentation and relief of the maimed, poor, needy or impotent people, as to set the poor to work, such hospitals to be named by the founder, to be bodies corporate forever, and to be ordered, directed, and visited as the founder should devise or establish in writing, his rules not being contrary to the laws of the Realm, and the limitation of the endowment of such houses, not exceeding the yearly value of two hundred pounds beyond reprises. 39 *Eliz. c. 5*, 7 *Pick. 2.* Although this statute, being an experiment, was cautiously limited to twenty years, it was made perpetual by 21 *Jac. 1 c. 1*, and was part of the settled legal policy of England, until the 9 *Geo. 2, c. 36*, the Mortmain Act of 1736.

This was but one measure of the Queen, now keenly alive to the necessity of looking up the charities of former days, and setting them once more on their feet. The prostration of the monasteries had cast the poor and ignorant upon the public at large, the cold humanity of parish workhouses. The predatory spirit which had marked the public policy of Henry the 8th, had also no doubt pervaded his subjects of all religions and of no religion; and by public violence and private fraud, the great mass of these charities had been misappropriated. Their legal validity was no more questionable than their piety; but in the great public contest for property as much as for power, which had agitated the Sovereigns of England for so long a period, what wonder is it that their subjects had caught and diffused the infection? Hence the necessity of the two great statutes of Elizabeth, on the subject of charities, so often quoted, and the motive of which has generally been so little understood, the 39 *Eliz. c. 6*, which immediately followed the Hospital Incorporation Law, and the 43 *Eliz. c. 4*, commonly called the Statute of Charitable Uses. The design of neither of them was to make any thing valid that was not valid before, nor to select any charities whatever as being alone entitled to the sanction and protection of law. Their very titles are an answer to the suggestion. The 39 *Eliz.* is entitled “An act to *reform deceits and breaches of trust*, touching lands given to charitable uses.” The 43 *Eliz.* is entitled “An act to *redress the misemployment* of lands, goods, and stocks of money heretofore given to certain charitable uses.” The object of both was to bring to the light, and to preserve forever, these blessed charities for the poor, the uneducated, the sick, and the public weal generally, which, in the venal struggle for feudal tenures, and in some personal respects, the equally venal struggle for religious supremacy, had fallen a sacrifice to public and private pillage.

The preamble of the 39 *Eliz.* recites, that “Whereas divers Colleges, Hospitals, Almshouses, and other places within this Realm of England, have been founded and ordained, some of them by the Queen’s most excellent majesty, and by other her noble progenitors, and some by other godly and well-disposed persons, for the charitable relief of poor, aged, and impotent people, maimed soldiers, schools of learning, orphans, and for such *other good, charitable, and lawful purposes and intents*: and whereas divers lands, tenements, hereditaments, leases, goods and chattels have been given, limited and appointed for the [said] charitable good and lawful uses, intents and purposes, and also for reparation of highways, amendment of bridges and sea banks, for the maintenance of free schools and poor scholars, as also for the relief and preferment of orphans and fatherless children, and such like *good, lawful and charitable uses*, which lands, tenements and hereditaments, goods, leases and chattels

have been and are still like to be most unlawfully and uncharitably converted to the lucre and gain of some few greedy and covetous persons, contrary to the true intent and meaning of the givers and disposers thereof: to the end such godly and charitable purposes and uses may be from henceforth observed and continued according to the true intent and meaning of the givers and founders thereof, and according to the true intent and meaning of any the aforesaid good, godly and charitable uses and intents,"—the statute then proceeds to authorize a commission from the Lord Chancellor, or Lord Keeper, to the bishops of the dioceses, and to other persons of good and sound behaviour, to inquire of such gifts and abuses, and after inquiry to set down such orders, judgments and decrees, as that the said uses may be truly observed.

The statute of 43 *Eliz.* has a recital of similar import, which from its being better known, it is not necessary to recite.

The two statutes differ from each other mainly in this, that the first is *universal*, comprehending charities of every kind—the latter comprehending only *certain* charities as requiring the benefit of the special remedy by commission. They differ also in some few subordinate provisions not material to be detailed. 2 *Gibson's Codex*, 1155, 1156.

A reference to one other statute is necessary to complete the enumeration, the statute of 7 *Jac.* 1, c. 3, 7 *Pick.* 218, which provides the same remedy by commission, for moneys given or to be given for the binding out of poor children as apprentices to needful trades and occupations, and regulates such apprenticeships, as being "good and godly purposes," and such from which "no doubt there will ensue the exceeding good of the Commonwealth in general." *Shelford on Mort.* 819.

Is it possible to give a higher testimony to the validity of charitable uses at common law, than this reference to English statutes? And do they recognise any description of charity whatever, as more certain, lawful, good, or godly, than that of Mr. Girard, which is devoted to the poor, to the orphan poor, to the uneducated poor, and which, after maintaining and instructing them to a competent age, consummates the charity, by binding them out to occupations by which they may establish themselves in life, and from which "no doubt there will ensue exceeding good to the Commonwealth in general?"

As a matter of like tendency to prove the validity of charities at common law, I may advert finally to one of a professional character, which has contributed more than any other institution to the scientific knowledge and developement of the law, and which from its connexion with this great and enduring public interest, has continued unchanged amidst the ever-varying changes of five hundred years. The Inns of Court, in London, are charities, as are likewise the Inns of Chancery. Their

property is held by individual trustees for selected members, and so they have been from before the time of Fortescue, who wrote the *De Laudibus* at the end of the 15th century, at which time they were already of such mature age, that he says there were in the four Inns of Court, the *Hospitia Majora*, about 800 students, and in the ten Inns of Chancery, the *Hospitia Minora*, an hundred students each at the least. *Fortesc. de Laudibus, c. 49; Shelford on Mort. 33, 392.*

2. THE OPINIONS OF LEARNED JURISTS, are the next head of proofs; and of these, which might be multiplied to any extent, I shall cite but three, one of them from a commentator before the age of Elizabeth, one from the beginning of the last century, and the last from an eminent Chancellor, whose error in regard to the Jurisdiction of Chancery over Charitable Uses, may be said to have occasioned the present controversy, by having been in some degree the cause of the first deviation of the law of charities in this court, from what I shall prove to have been its accustomed path from time immemorial.

Doctor & Student, c. 39, p. 224. "If a priest have won much goods by saying of mass, whether he may give those goods, or make a will of them."

One inquiry in this chapter is, whether there be any difference between the power of a spiritual person,—a *clerk*—over what he has by reason of his church, and what he has by reason of his person.

The *student* says there is great diversity according to the *law of the church*, as it is stated in the *Summa Rosella*, between the two kinds of goods, so that he may not dispose of them both with equal freedom; but instead of treating of this, he says he will a little touch "what spiritual men may do with their goods *after the law of the Realm.*"

As to a "parson of a church, vicar, or chantry priest, or such other, all such goods as they have, as well such as they have by reason of the parsonage, vicarage, or chantry, as that they have by reason of their own person, they may lawfully give and bequeath where they will, *after the common law*; and if they dispose *part among the parishioners, and part to the building of churches, or give part to the ordinary, or to poor men*, or in such other manner as is appointed by the law of the church, they offend not therein, unless they think themselves bounden thereto by duty, and by authority of the law of the church, *not regarding the king's laws*; for if they do, it seemeth they resist the ordinance of God, which hath given power to princes to make laws."

This is clear to the point, that such charitable gifts were good by the *king's laws*, and not merely by *the law of the church*, which did not give the rule in England.

Sir Jeffrey Gilbert, says: "The limitation of a use to the poor of the parish of Dale, is good, though no corporation; for though they are capable of no property at the common law, in the thing trusted, because the rules of pleading require persons claiming to bring themselves under the gift, and no indefinite multitude, without public allowance, can take by a general name, yet they are capable of a trust; for here the complainants do not derive to themselves any right or title to the estate, but show that it has been abused and misemployed by the owners, contrary to conscience." *Gilbert on Uses*, 88, *Sugden's Ed.* He repeats the same at page 405.

Lord Chancellor Loughborough, in the *Attorney-General v. Bowyer*, 3 *Ves. Jr.* 725, speaking of *Porter's case* in 1 *Reports* says, that "the authorities referred to by Lord Coke, who argued it, are authorities from antecedent cases in which this doctrine was established, that if a feoffment is made to a general legal use, not a superstitious, not a bad use, but a legal, moral and proper use, though indefinite, though no person is in esse who could be the cestuy-que use, yet the feoffment is good, and if it was bad, the heir of the feoffor would have been entitled to enter, the legal estate remaining in him. Several instances were mentioned of a general indefinite purpose, one from *Bendloe*, a feoffment to the use of the poor indefinitely. No use could be more general, or could less produce a certain person to whose use it could be said to enure; but the common law held that the use being good, the estate well passed, and there was no right in the heir of the feoffor." "The same point in effect was determined in the case of *Sutton's Hospital*; for Sutton had made the conveyance by bargain and sale, without having obtained a previous license, and a previous incorporation. The bargain and sale were antecedent. Therefore the argument was, that the heir at law of the bargainor was entitled to enter. He brought an ejectment; and if the argument was well founded, that because there was no estate to which the bargain and sale could relate, it operated nothing, and was for a general and indefinite purpose, his entry was good. It was held that it was not void, but was a good conveyance of the land. Though the corporation was not in existence, the purpose being good, the heir of the bargainor had no interest in the land." "Then how does this case stand, if these were good uses, and bargains and sales, or feoffments to such uses, would have taken the estate completely out of him, and so have barred the heir. *An appointment by will, if the purpose described by the will is good, is a good use at common law. If the trust is to be executed in this court, this court by the power it has, and the jurisdiction over trusts, ought to prevent the heir at law from claiming any right.*"

Nothing can be more clear, or more accurate. How consis-

tent it is with the previous *dictum* to which I am hereafter to refer, is another matter.

3. DECISIONS AT COMMON LAW.—I am bound to say, that I have not been able after a careful research, to find a single case in which a charitable use has ever been directly decided to be valid. It would perhaps be as easy to find a case in which it was directly decided that an estate to a man and his heirs is a fee simple. The validity of such uses in the abstract has never been questioned. They have been held good against certain objections, or they have been assumed by the courts to be good, or their general validity is the admitted basis of argument by counsel on both sides, and it is in one of these forms that their validity has been established. The theory of the complainants' counsel, that before the statute of 43 *Eliz.* all these indefinite charities, as they are called, were given to monasteries or incorporated bodies, and that charitable uses to others began with that statute, is destitute of any the least support in fact.

One of the earliest cases is in the Book of Assizes, 38 *Edw. 3*, *ch. 3*, *A. D.* 1363. "An assize of novel disseisin was brought against A, who pleaded to the assize, and it was found by verdict, that the ancestor of the plaintiff, devised his lands to be sold by the defendant who was his executor, and to make distribution of the moneys for his soul." I have already shown that a devise *pro anima* was a charitable use, distributable according to a certain order, among the poor and other objects within the general description of charity. "And it was found that presently after the death of the testator, one tendered a certain sum of money for the lands, but not to the value, and that the executor held the land in his own hand, and took the profits for two years, without doing any thing for the soul of the deceased. *Per Mowbray*. The executor in this case is held by the law to make the sale as soon as he can after the death of the testator, and it is found that he refused to make the sale, and so there was a default in him. And also by force of the devise he was bound to have applied all the profits of the tenements to the use of the dead, and it is found that he took them for his own use. And so there is another default. Wherefore it was awarded that plaintiff should recover, &c."

Lord Coke cites this case to prove that a devise *ad vendendum* makes a condition. It was a condition subsequent—and a lawful condition subsequent—otherwise the devisee's estate was absolute. 1 *Inst.* 236, *b.*; 1 *Shep. Touch.* 129; 1 *Inst.* 206, *b.*; *Bac. Abr. Condition K.*; *Poor v. Mial*, 6 *Madd.* 32; *Boyle*, 364. Sir Thomas Shewell's decision in *Bland v. Wilkins*, 1 *Bro. Ch. Rep.* 61, (note,) has not been followed.

Perkins 563. "If a man seized of land devisable in fee, deviseth the same unto I. S. clerk, upon condition that he shall be a chaplain, and shall sing for the soul of the devisor all his life, and that after his decease the land shall remain to T. S. mayor of S., and his successors, to find a chaplain perpetually for to sing for the soul of the devisor, and the devisor dieth, and I. S. being of the age of twenty-four years, entereth and holdeth the land for six years, and is not a chaplain, the heir of the devisor may enter for the condition broken, and yet the remainder shall not be defeated, but shall take effect after the death of the devisee for life." Perkins adds a *tamen quære*—not as questioning the validity of the charitable use in remainder, but as to the effect of the entry, as avoiding only the estate for life, and not the whole estate.

Anderson 43, 3d Eliz., Annis's case. I. S. Annis, 4 & 5 *Philip and Mary*, devised all his lands to eight persons, and their heirs, to the use and intent and upon condition to find a priest to celebrate for his soul and other souls, as long as the laws of the land will suffer; and if the law will not permit it, *then to take the profits to the use of all the poorest people in six of the nearest parishes.* And the justices held that this devise was not contrary to any statute of suppression, nor contrary to any other statute. The reporter adds, "*Quære the statute 23 Henry VIII. and consider it;*" but this *quære* has been long since disposed of; for where a testator gives to a void use, and if the first be unlawful, then to a good use, the second use is good. *Widmore v. Woodruffe, Ambl. 636; Attorney-General v. Hartley 4 Bro. Ch. Rep. 412; Attorney-General v. Tancred, Ambl. 351.*

The *Skinners' case, Moore, 129, pl. 277; 24 & 25 Eliz.* One Barton devised, 12 *Hen. 6*, to the master and wardens of Corpus Christi, London, and to the parson of the Church of St. Jones of Walbroke, and their successors, five messuages in Wood Street, and four marks rent, upon condition to employ the annual profits. 1. *To sustain poor men decayed through misfortune, or visited by the hand of God, who should inhabit the said houses;* and the testator appoints that they should pray for the souls of King Henry VI., and his heirs, and for the soul of the devisor and his heirs and progenitors. 2. *To pay six shillings and eight pence, and three shillings and four pence, to the Mayor and Recorder of London, who should be present at an annual obit to be held by the corporation.* 3. *To pay eleven marks annually to the priest to chaunt for the souls, and three shillings and four pence for his robe.* 4. *To repair the houses.*

An information of intrusion was brought in the Exchequer by the queen, under statute 1 *Edw. VI.*, for the dissolution of chauntries, with an averment of the use of this obit and stipends, within five years before the statute; and the point was, whether

the crown should have the land, or only so much as was employed in the superstitious uses within the five years before the statute.

The court held and adjudged that the principal purpose of the gift to the poor was charity to them, and so also were the repairs of the houses in which they were to live; though at the same time the principal purpose of the obit and priest was superstitious; and therefore that the queen could not recover the lands, though she might have so much of the profits as were to go to the superstitious uses. Wherefore judgment was given against the queen, who compromised with the Skinners' Company.

This case shows also that the Corporation of the Skinners' Company, before the 43 *Eliz.*, might be a trustee for the poor.

Gibbons v. Maltyard and Martin, *Poph.* 6, 34 & 35 *Eliz.*—This was an ejectment for lands in Croxton, and was one of a class of cases, instituted and decided about the same time, fixing the interpretation of the 23 *Henry VIII.* against superstitious uses. The statute stood in the way of charities, as its language was equivocal, extending literally to good uses as well as bad, and excepting, by proviso, two undoubtedly good uses particularly named. Charities were deemed essential to the Crown, and to the people; and as the repeal of the statute was not desirable, it was this circumstance, and not the want of a remedy in Chancery for charitable uses, that made an authoritative interpretation at law necessary. To the courts of law it must have come at last, even had the proceeding been in Chancery.

The will of Sir Richard Fulmerston devised that his executors should find a preacher to preach four times a year in the church of St. Mary, in Thetford, forever, to have ten shillings for each sermon; and he further devised to his executors and their heirs, certain lands and tenements, *in Thetford*, to the intent that within seven years after his decease, they should procure the queen's licence to erect a free grammar school in Thetford, forever, to be kept in a house erected on the land, and that they should assure three of the tenements to the schoolmaster and usher, and their successors forever, and the other for the habitation of poor people, two men and two women, forever. And for the maintenance of schoolmaster, usher, and poor people, he devised his tenements *in Croxton*, to his executors and their heirs, for the performance of his will, for ten years, and afterwards to Sir Edward Clere and wife, and his heirs, on condition that within the ten years, they would assure lands to the said executors and their heirs, to the value of thirty-five pounds per annum, for maintenance of the preacher, schoolmaster, usher, and poor people, in the said house; and if they should make default, he devised the land *in Croxton*, to the executors, and their

heirs, in trust, that they should dispose of them for the same purpose.

Thomas, Duke of Norfolk, and Peacock, were executors, who refused the burden of the will. The plaintiff was the heir at law of Peacock, the survivor. The testator died in 9th Elizabeth.

The seven years passed without establishing the school, whereby the land in Thetford became forfeited for the condition broken, (but the trust was nevertheless carried into effect in 7 Jac. 1, *Case of the Thetford School*, 8 Rep. 130.) The executors did nothing but renounce.

Within the ten years, Sir Edward Clere made feoffment of land, to the value of thirty-five pounds a year, to the surviving executor, for the use of the school, but with a condition contrary to the will—and no livery was made, whereby he broke the condition annexed to his estate.

Peacock, the son, entered 32 Eliz. into the lands in *Croxton*, and demised to the plaintiff who entered, and the defendant, by command of Sir Edward Clere's heir, entered upon him.

The defendant contended—1. That the trust was void under 23 Henry VIII, the uses, though good at common law, being bad by that statute, which meant to destroy such good uses. 2. That the estate of the executors was void for breach of implied condition, in not providing a preacher within the ten years.

The court held that the trust was not void under the statute—that the estate of the executors was a trust that remained in force, and not a condition that was broken, and gave judgment for the plaintiff.

I have been more particular in the statement of this case, because this is the most remarkable of all the cases I have found at common law. It not only expressly decides that the Stat. 23 H. VIII. did not prejudice the trust, and therefore that the use remained good as at common law, but it also decided that no omission by the devisee to enter during the ten years, the term of his first estate, prejudiced the trust; but that after renouncing the will, and neglecting the trust for the ten years—and after breach of the condition in the devise to Sir Edward Clere, for not duly settling to the required value for the use, the heir of the executor might enter and recover the lands to execute his trust. The court was here upon the dividing line between the old and new law as to conditions and trusts. The devise to the executors for the term of ten years, to perform the testator's will, was held not to be a condition either express or implied, but a trust. In other like cases about the same time they were held conditions, and in 38 Assizes, the devise *ad vendendum* which Lord Coke calls a condition, would now certainly be a trust. See 1 Sug. on Powers, 6th edit. 121. Instead of the heirs taking advantage of it now, as was done in *Porter's case*, the trust would be enforced in Chancery. See also *Gibbons v. Marltyward, Moor*, 594.

Porter's case, 1 *Rep.* 22, 34 and 35 *Eliz.* was an information in the Exchequer by the queen, to obtain a decision on the 23 *H. VIII.* Nicholas Gibson died in 32 *Henry VIII.*, having devised the premises in question to Avis his wife and her heirs upon condition, that whereas he had built certain houses, convenient for a free school, the master of the same, and certain beadmen and beadwomen, he willed that the said gift to his wife should take effect on condition, that with all convenient speed after his death, on the advice of learned counsel, she should assure give and grant all his said land and tenements for the maintenance and continuance of the said free-school, almsmen and almswomen forever; and that his wife should have all the rents and profits yearly during her life, bearing the charges of the said school, &c., as the same was then kept. The wife did not perform the condition, but leased the premises for forty years, upon which the heir entered and conveyed to the queen.

It was supposed in a former case in this court, *Baptists' Association v. Harts' Exec'rs*, 4 *Wheaton*, 35, that it was impossible to resist the conviction, that Chancery could not then afford any remedy for a charitable use, otherwise this trust would not have been suffered to remain unexecuted from 32 *Henry VIII.*, nor the attempt have been now made to enforce it by the awkward method of an entry and conveyance by the heir. But that remark misconceives the object of the suit, which was to obtain a decision at law on the Statute. The delay in executing the trust, was owing to the language of the 23 *H. VIII.*; and resort was had to the law, and not to Chancery, because in the first place the devise was on an express condition, which in the then state of equity, might not have been regarded as a trust, but principally because the interpretation of 23 *H. VIII.* was matter of law in such a case for the law judges. Had it gone into Chancery, Chancery would have sent it to law for the opinion of the judges.

The whole question was on the interpretation of 23 *H. VIII.* The counsel for the queen argued that the use was good at common law, and the counsel for the lessee admitted it. They differed only as to the Statute. Coke and Egerton contended that the Statute did not apply, and therefore the use being good, the condition subsequent was good, and the entry and conveyance to the queen good. The counsel for the lessee contended that the Statute meant to make good uses like these void, that the condition subsequent was void, and therefore that the wife's estate was absolute, and her lease good. The judges resolved that the Statute 23 *H. VIII.* did not extend to take away the good and charitable uses in the case, and that the condition for the causes stated, was broken, and therefore judgment was entered for the queen. Lord Coke is careful to state, that on the same day this

point was resolved by Sir John Manwood, and all the Barons of the Exchequer, and by Sir John Popham, and all the justices of the King's Bench, which shows that the point was deemed of great public importance and interest.

Certainly the decision of the court, and the full argument of Coke and Egerton, show the undoubted validity of these uses at the common law; but they show nothing in regard to the remedy in Chancery, which was not sought, because it was not wanted; but which, if it was a case of *trust*, could have been had if it had been asked, as will be shown.

Bruerton's case, 36 *Eliz.* 6 *Rep.* 2, decides the validity of such uses, by deciding, or rather recognising, the established principle, that in the case of entire services which are for works of charity, although the lord purchases parcel, yet the entire services remain; but where they are only for the benefit of the lord, by the purchase of parcel all is extinct. Charitable services are not only valid, but highly favoured as a public service.

Partridge v. Walker, 37 *Eliz.* *Duke* 360. Hill devised houses in London to the parson and churchwardens of St. Bride's, to find forever his anniversary, appointing upon it twenty shillings, which was a superstitious use, and "to pay to the poor five shillings and sixpence, *in honorem et duplicationem annorum in quibus Christus vixit in terra.*" Adjudged that the land was not given to the king by 1 *Edw.* 6, because the last payment was good.

This is another case of valid trust in a corporation for third persons, before statute 43 *Elizabeth*.

Hewett v. Wotton, 21 *Eliz.* cited in *Adams & Lambert's case*, 4 *Rep.* 109, *b.* *Duke* 469. The testator enfeoffed divers to use of his will, and willed that they should find a priest to sing mass in the Church of St. Mary's every Sunday, and that they, out of the issues and profits of the land, should pay the priest two-pence every week, and the residue to be employed *upon books, vestments, and other ornaments of the church.* Adjudged, that the stipend to the priest being certain, and also joined with a *good use*, the land was not given to the king, but only the stipend which the priest had.

Chebnall v. Whitton, 30 *Eliz.* cited 4 *Co.* 110 *a.* Bennet Harlewyn, 36 *Hen.* 6, by his will in writing, devised to the Master and Brethren of the Guild of Drapers, three shillings and fourpence yearly, to be employed *for poor Brethren and Sisters of the same Guild*, and a house in Fleet Street to the parson and churchwardens of St. Christopher's Parish and their successors, to pay the said three shillings and fourpence annually, and threepence every week to a chaplain to pray for his soul;—and that they pay every week to three poor men of that parish, sixpence to pray for his soul, and after several other uses that

were not superstitious, the residue to be kept in the treasury for repair and support of the tenements and the rebuilding thereof. Adjudged, that because the three shillings and fourpence to the poor, and the other uses of like kind, were *good uses*, the finding of a priest to pray for his soul did not give the land to the king.

This is another instance of trust in a corporate body for the poor, before 43 *Elizabeth*.

Here then are *ten cases*, all before the 43 *Eliz.*, all of a solemn character, and all of them incontestably clear to the point, that perpetual charitable uses for the poor,—for the poorest of the six nearest parishes,—for poor men decayed through misfortune, or visited by the hands of God,—to find a preacher in such a place,—for maintenance of master and usher of a free grammar school,—for a free school, almsmen and almswomen,—are good, lawful and valid uses by the common law of England.

I need not say that there is no case in England, that has ever held such uses to be void. I do not say there is none to show that a *legal* estate to uses may sometimes be void; but as to the uses themselves at common law, and until the Mortmain Statute of 9 *Geo. 2*, c. 36, there is not an instance. There cannot be one. The general law of England in matters of charity, thoroughly carries out the language of the apostle, "*charity never faileth*;" and equity not only declares the same thing, but makes it effectual.

This court has extensively acted upon the principle, as being a principle of the common law of this court, and the common law of many of the States. It has repeatedly sustained dedications of land to public uses, to religious uses, to the use of church congregations, without deed, without writing, without trustee; and it is impossible to suggest a reason for this, independent of the doctrine of charities. Public uses of the kind sustained, are charitable uses. There is no other head under which they can come; and it is only under this head, that the court has any principles to sustain them at all. They gave full effect to the principle of law in *Howell's Lee v. Barclay*, from Pennsylvania, 6 *Peters*, 498; *Cincinnati v. White*, from Ohio, 6 *Peters*, 431; *McConnel v. Trustees of Lexington*, from Kentucky, 12 *Wheat*. 582; *New Orleans v. United States*, from Louisiana, 10 *Peters*, 712; *Kurtz v. Beatty*, from Maryland, 2 *Peters*, 256; *Town of Pawlet v. Clark*, 9 *Cran.* 202, and *Society v. Town of Pawlet and Clark*, 4 *Peters*, 480, from Vermont. In *Inglis v. The Trustees of the Sailors' Snug Harbour*, 3 *Peters*, 99, it is clear that the court was sitting uneasily under the Baptist Church case, as coming into conflict with all they had done in these cases, both before and afterwards.

Under another point, I will show that the common law generally is the law of Pennsylvania.

I am bound, however, to notice an objection of the complain-

ants' counsel, that the charitable use for the Orphan College, as it is established by Mr. Girard's Will, is opposed to Christianity, to rights of conscience, and to the Constitution and Law of Pennsylvania, of which Christianity is claimed to be a part; and therefore that it is not one of those uses which are shown to be valid by the common law.

There are three or four directions of the testator, in the 21st section of his Will, having a relation to this point, which it is necessary to state. They are as follows:

"5. No orphan should be admitted, until the guardians or directors of the poor, or a proper guardian or other competent authority, shall have given by indenture, relinquishment or otherwise, adequate power to the Mayor, Aldermen, and Citizens, of Philadelphia, or to directors or others by them appointed, to enforce in relation to each orphan, every proper restraint, and to prevent relatives or others from interfering with or withdrawing such orphan from the institution."

"7. They shall be instructed in the various branches of a sound education, comprehending reading, writing, grammar, arithmetic, geography, navigation, surveying, practical mathematics, astronomy, natural, chemical, and experimental philosophy, the French and Spanish languages, (I do not forbid, but I do not recommend the Latin and Greek languages,) and such other learning and science as the capacities of the several scholars may merit or warrant. I would have them taught facts and things, rather than words or signs; and especially I desire that by every proper means, a pure attachment to our republican institutions, and to the sacred rights of conscience, as guarded by our happy constitutions, shall be formed and fostered in the minds of the scholars."

"9. In relation to the organization of the College, and its appendages, I leave necessarily many details to the Mayor, Aldermen, and Citizens of Philadelphia, and their successors." "There are, however, some restrictions, which I consider it my duty to prescribe, and to be, amongst others, conditions on which my bequest for said College is made and to be enjoyed, namely: I enjoin and require *that no ecclesiastic, missionary, or minister, of any sect whatsoever, shall ever hold or exercise any station or duty whatever in said College; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises appropriated to the purposes of said College.*"

"In making this restriction, I do not mean to cast any reflection upon any sect or person whatsoever; but as there is such a multiplicity of sects, and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce. My desire is, that all the instructors and teachers

in the College, shall take pains to instil into the minds of the scholars, the *purest principles of morality*, so that on their entrance into active life, they may *from inclination and habit*, evince *benevolence towards their fellow-creatures*, and *a love of truth, sobriety, and industry*, adopting at the same time such religious tenets as their *matured reason* may enable them to prefer."

Of these, the italicised direction in the 9th paragraph, which excludes all ecclesiastics from holding any station, or performing any duty in the college, and from being visitors within the premises, gives, it is said, the death blow to this charity: in what way, under what interpretation, by what principle of the law of charities, or of any law, has not been developed, has not even been stated by the opening counsel. It is foreshadowed to us by solemnity of manner, by awful forebodings of a race of coming atheists, who are to dishonour their Creator, and by a pungent allusion to the marble palace, and the infidel training, as unfatherly gifts of a stone for bread, and of a serpent for a fish. But except as these metaphors may teach us, we know nothing, absolutely nothing, of the way or manner in which it is intended from this direction of the testator, to frame, or state, or point a single legal proposition against the charity, which the counsel for the city are expected to meet, or which the learned court are seriously to consider. We are to conjecture, to anticipate, to apprehend as well as we may, and to fear even more than we may apprehend; but as to definite and plain argument, or even statement, we have not had a word nor half a word upon the point: so that we go into this part of the case, as indeed we go into all other parts, in an entirely new order of battle, especially for a re-argument. The point, if it be a point, is a point of law, and not merely a theme for oratory, or for an eulogium upon the Christian religion, or on Christian ministers, whom no one has assailed or would assail, and for which and whom certainly the counsel of the city do not mean to admit, that they yield in true love and veneration, to any counsel here or elsewhere. If it be a point of law, with any parts or proportions, or claiming to have any such, we were entitled in all candour to see them, to handle them, to measure them, and if we had fallen after such a survey, it would have been at least a fairer fall.

The question before the court is and must be altogether a question of law, for the court considers and decides no questions but questions of law. The judges will not entertain the inquiry, whether Mr. Girard's directions are expedient, or respectful to the clergy, or likely to make his school as profitable as other directions might have made it. All such questions are in this place *coram non judice*. We are confined here, and righteously confined, "to the law and to the testimony; and if we speak not according to this word, there is no light in us."

I have no pleasure in a public investigation of even points of

law, that require me to speak upon the subject of religion. Few men who think seriously in regard to it, are over ready to utter what they think in mixed assemblies. Few men who think with the greatest attention upon it, and are happiest in always expressing precisely what they think, are over willing to trust themselves with it, in a debate like this. In a contest for victory, we are not always masters of our language, not always perhaps followers of our principles. Though the subject, and the duty we owe to it, require us to weigh our words "in scales of gold," yet light words that will not bear the weighing, may thoughtlessly escape to our own prejudice, and what is much worse, words, alloyed below the standard, may be hastily uttered, to the prejudice and dishonour of religion itself. I desire therefore, if possible, to raise myself above these dangers, by treating this question as I have a right to treat it, as a question of law, to be submitted to the court under the responsibility of my professional character, and not under the guarantee of my religious opinions. I do not mean to make any profession of them, or to speak of them. I will not suffer my own conscience or my conscientious belief to be even named by me. My remarks will be addressed to the judicial conscience of the court, and if I satisfy that, I can easily satisfy myself that the rest belongs to a different forum.

With a reasonable, reflecting, and above all, a religious man, I would cheerfully undertake the task of proving, that whether Mr. Girard was wise or unwise in the direction he has given, he did not mean either to dishonour religion, or to exclude it from his school. I would undertake to prove it even to the complainants, who surely cannot be gratified by perceiving that their road to success, is over the prostrate character of their kinsman and benefactor. But they would not believe me, if I intercepted their victory; and I should not cheerfully assume the task with any one who would make religion a stalking horse to steal away the bread of the orphan. I must therefore make the court my judges both as to the motives of the testator, and the legal effect of his acts; and it is perfectly immaterial to me, whether his motives be or be not examinable, as entering or not entering into that effect. I will assume that they may be examined.

The first inquiry is, by what rules or principles of interpretation this will is to be tried. The wish, and the desire, and the necessity of the complainants, are clear. They all demand of counsel, that they shall impregnate this clause of the will with dark and deadly poison, and then re-distil each word by their own fires, to drop a darker and deadlier poison over every clause and member of the whole instrument. They would no doubt precede the process by a sincere and eloquent tribute, to the benign spirit of Christianity, and to that self-denying body of men, its ministers, who alone by their ministrations of the gospel, and by the grace which it promises to their labours, have made,

or can make the education of the poor or the rich a blessing to themselves, or consistent with the welfare of society. The court would acknowledge this tribute to be as just as it was eloquent, and they would probably wait for its application to the cause. The application, if it might be so called, would at length come in this, or something like this form.—Christianity is a part of the common law, and part of the common law of Pennsylvania. The Christian religion can be taught only by ecclesiastics, missionaries or ministers. By excluding them from the school and premises, the testator meant to hold up the Christian religion to derision, and its ministers to opprobrium. He meant to incapacitate his trustees for teaching Christianity to the pupils, by denying them the use of the necessary means. Nay more—he meant to enjoin them not to teach it, but to bring up the pupils in contempt of it—to cause infidelity to be taught in the place of it—and to send these young men into the world, at the height of their passions, not only without the least tincture of Christian morality, but with either deism or atheism, as their conductor and guide. Such is the scheme which the testator meant to prosecute; and by it to establish a nursery of irreligion—equally in defiance of Heaven, and in scorn of the law. That cannot be charity which has such a purpose for its end. The common law has never sanctioned such a scheme, and the law of Pennsylvania, of which Christianity is a part, must disown and reject it.

The design, if fairly imputed, would deserve all that can be said against it. It would be difficult to find an advocate for it, here or any where. But the right and the duty of both the court and the counsel for the will still remain, after eloquence has done its best and its worst, to inquire whether as much pains have been taken to prove the design, as to denounce it. The cold question must be asked and repeated, and it must receive an answer. Where is such a design to be found in the Will? Of what words is it the fair interpretation? By what rule of interpretation is such a meaning to be extracted from the words? In a case of charity, and for the overthrow of a charity, are we to banish both charity and reason from the cause, and to fly into the air to the remotest distance possible from the universal standards, by which the wills of all men are to be tried? Are we to fly, and to expect that the grave judges of the court will fly with us?

Mr. Girard, in giving this direction, has used plain, familiar, and intelligible words. There is no ambiguity whatever in them. They have a clear definite meaning, which any man, learned or unlearned, may apprehend; and it is one meaning, and neither more nor less. He enjoins and requires, and this is all that he has said, and all that he means, that no ecclesiastic, missionary, or minister, of any sect whatsoever, shall ever hold or exercise

any station or duty whatever in the said College, and that no such person shall ever be admitted for any purpose, or as a visiter, within the premises appropriated to the purposes of the said College. This is a meaning as lawful as it is plain. We may think what we please of the injunction, as uncourteous, disrespectful, inexpedient. I will speak of these presently. But we cannot think—no one on the responsibility of his professional character will say—that what it thus plainly means to enjoin, is unlawful. In other words, no man will say that any ecclesiastic, missionary, or minister, of any sect whatever, has a *lawful* right to hold or exercise any station or duty in such a college, or to admission for any purpose, or as a visiter within the premises, *against the will or injunction of the founder of it*. If this exclusion be its meaning and end, and its whole meaning and end, there never was, and never can be, a more lawful injunction by the founder of a school or college, be the consequences what they may.

To infer it to mean a command to the trustees, to do or to omit something *within the school*, and *upon the premises*, and *in regard to the pupils*, in reference to all which he has not said one word—and to infer moreover, that this something which he has not enjoined, or required, is against law and decency, and so unlawful and indecent, as to vitiate the very foundation of the school, is in my judgment an exposition as manifestly against the express words, as it is possible to imagine; and offends against common sense, as much as it does against all the conservative principles which the wisdom of ages has adopted for the protection of deeds and last wills. It offends against that fundamental rule, that where there is no ambiguity in the words of a deed, there shall be no interpretation against their express meaning. It offends against that equally fundamental rule in the interpretation of wills, that they shall if possible be so construed, as to make the intention consistent with the rules of law. These plain words are, on the contrary, so construed as to make them in the notion of the objectors, inconsistent with law, and they are so construed only because such a meaning is inconsistent with law. An interpretation so violent, unnatural, and extreme, is in principle subversive of all wills, and of all authorities in regard to them. Here are plain words, giving out but one sense, both by their grammatical and their legal construction; and yet conjecture, inference, subtlety of argument, are to extract from these elements some fifth essence, that will pass by derivation as a part of them, and yet possess a poison completely fatal to their lawful purpose. What will can stand a process, that charges upon the material that has been tested, the poison that was in the tests? Surely no analysis had ever less respectable pretensions to accuracy.

This will appear the more clearly by reference to the context, in which the motive of the restriction is assigned by the testator.

He declares, that in making this restriction, he does not mean to cast any reflection upon any sect or person whatever; but as there are such a multitude of sects, and such a diversity of opinion amongst them, he desires to keep the tender minds of the orphans, who are to derive advantage from the bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce.

The motive was therefore to keep the minds of the pupils free from the influence of clashing opinions and sectarian controversy. The means adopted, were the exclusion of ministers of every sect from the College. By such a motive and such means, the end or object is as clearly limited and defined, as if he had expressly excluded all other ends—it is namely, to prevent the introduction of religious controversy into the school. The testator may have been wrong as to both the means and the end. He may have been unwise in thinking, that the excitement of religious controversy was bad for the pupils—or that the indiscriminate admission of ministers would lead to it—or that their indiscriminate exclusion would prevent it. We have nothing to do with the truth or error of such opinions. He had a right to entertain them; as other men, for the government of themselves and their property, have a right to entertain the contrary. He was the only judge for himself and for his school. One thing, however, is certain, unless we read the will backwards, that this was his meaning and purpose, and only this.

Here is express affirmative declaration of motive, in addition to express affirmative appointment of means. He excludes ministers of all sects—he excludes nothing else. He desires to keep the pupils free from the influence of sectarian controversy—he desires nothing else. If such plain, frank and honest avowals and provisions,—honest they must be, whatever we may think of their wisdom,—can be treated by counsel as deceptive and colourable, intended to smuggle deism into his school, or to reject Christian teaching altogether,—it is of no importance what a testator shall himself say in his will: the only important point would seem to be, what his heirs and next of kin can induce able and eloquent men to argue concerning it. If the mere reading of the will is not an answer to all that can be said, it is a vain thing to write intelligibly, and a vain thing most especially to write a last will. I do not at present say whether the Law of Pennsylvania compels all founders of free schools to cause Christianity to be taught in them, or does not. I do not say whether Christianity is a part of the law, to the extent of being imposed upon any man or body of men, or is not; but this I say, with all confidence, that if Mr. Girard's will is so interpreted by the court, as to exclude from his school religious instruction in the principles of Christianity, it is not

only vain, but absurd to write a last will. All that with any semblance of truth can be charged against his will, is that it *omits expressly to provide for the teaching of Christianity*: and if this is a fatal defect, no endowment of a school for instruction in human learning only, can ever be lawful—which is an absurdity. If the law under all circumstances requires Christianity to be taught in every school, it is a doctrine of the first impression, here and every where.

I desire, however, to rescue the testator from the reproach of privately meaning any thing hostile to Christianity, that he has not said, or of intending the slightest disrespect to the body of Christian ministers, contrary to what he has said. There is enough in his will, to enable me to do it.

What his religious opinions were, we have no materials for ascertaining. Like the inhabitants of Mount Gerizim, he may have worshipped "he knew not what;" but in many parts of his life, and in the last act of it, he was a good Samaritan; and from this we may ascertain, what his wishes were in regard to the feelings and happiness of others. That great example proves, that even a schismatic, who rejected the Temple worship, might do a deed of charity in the full Christian sense; and so do it, as to be a perpetual lesson to orthodoxy, if it be cold-hearted and narrow-minded. Mr. Girard may not have been a religious man himself, and yet he may have been both willing and desirous that the children he was about to educate, should be so. It is not difficult to show this from his will, although he may not have declared it in that form, which a professedly religious man might and probably would have adopted.

He was well known to be, and his will proves it, a man of frank and fearless spirit, doing himself, and enjoining others to do, what he thought right, with little regard to the opinions of the world. He is entitled therefore to credit for sincerity, if for nothing else. Had he meant to exclude religion from his school, he would have done so as distinctly and emphatically, as he has excluded the ministers of religion. It is said the words which command this exclusion, are underlined or italicised in the original will. It is only another proof, that there was no intention to disguise any part of his purpose. It was in his power to avoid all question, by declaring that none but *Laymen* should be either instructors in the school, or visitors on the premises. Some men would have adopted this language as more respectful to ministers of religion, and less liable to misconstruction on that point. But meaning, and declaring that he meant, no disrespect to them, he preferred, and supposing him to have been sincere, and to mean nothing that he does not say, he wisely preferred the language he has used. By permitting none but laymen to instruct, he might have been understood, with less

violence than has been done to his will, to prohibit any but profane or secular learning. The present language leaves the instruction without any such restraint.

He says expressly, that his teachers in the College must take pains to instil into the minds of the scholars the *purest principles of morality*, so that on their entrance into active life, they may evince benevolence towards their fellow-creatures, and a love of truth, sobriety and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer. Interpreting these expressions with any the least candour, can they be understood to prohibit the Bible, from which the purest morality is drawn, or the evidences of Christianity, or such systems of Christian morals, as place them upon the sure and only sure basis of Christianity? I answer no. I aver confidently, that a contrary interpretation, if made upon the will alone, is as destitute of candour, as it is of conformity with legal rules of construction. Mr. Girard has enjoined instruction in the *purest morality*. He has given no statement of the basis on which he requires it to be taught. He has not said a word in opposition to the universal scheme of all Christian countries and seminaries, of uniting ethics with Christian theology, since nothing is to be made of morality without their union. He has left the basis of the science to the selection of his trustees. On what principle of common, decent justice to his will, can it be averred that he meant them to exclude Christian morals, and to teach deistical or atheistical morals?

I further aver, that if any regard is paid to his language, he must be understood to express a *desire*, that on leaving the College, the scholars may adopt *religious tenets*. The structure of the sentence demands this interpretation. He desires that they may then evince certain qualities, "*at the same time adopting*" religious tenets. It is grammatically the same in construction, as if he had said, I desire that they may show these qualities and *at the same time adopt* the tenets. The desire of the testator embraces all that follows, the adoption of the tenets, as much as the exhibition of the qualities. He supposes that the great truths of Christianity, in which all Christian denominations concur, will be taught in the College. From these he expects them to obtain the purest system of morality. Their religious *tenets*—the dogmas, doctrines, principles, which by different interpretations, different sects derive from the Scriptures—such of these as they may prefer, he desires them to adopt by the aid of their matured reason. By religious *tenets* he does not mean religion generally, fundamental or elementary religion. It is neither the accurate nor the popular understanding of the words. An inquiry concerning any man's religious tenets, could not be accurately or pertinently answered by saying, "he believes the Bible to be the word of God," or "he is a believer in the Christian religion."

The rejoinder to such an answer would be, I wish to know his *tenets*; and the only pertinent answer would be—he is a Catholic, a Protestant Episcopalian, a Presbyterian, a Baptist. Mr. Girard used the words in this sense only. They follow the exclusion of clashing doctrines, and sectarian controversy from the school; and he says in so many words, I desire that the tender minds of the orphans may be kept from the excitement of clashing doctrines, and sectarian controversy—I wish them to adopt their *tenets* on their entrance into active life, by the assistance of their matured reason, and not to be excited by the teaching of different sects, while they are at school. He may have been right or wrong in his notion. I have nothing to do with that. I think I cannot be wrong in supposing that this, and this only, is what he means.

Again, he especially desires that *by every proper means* a pure attachment to *the sacred rights of conscience*, shall be formed and fostered in their minds. What notion of the rights of conscience were they to obtain, without being instructed in the nature and office of conscience? Are they not to be taught what conscience is, and whose voice it speaks, and that it is the great demonstrative proof, irrefragable, and universal, of the being of God? Are they not to learn, that it is the faculty by which men judge of their own actions, by comparing them with the law of God, as it remains faintly perhaps written on their hearts, but stands distinctly revealed in his word? And can they be instructed in its rights, without being informed, that this law is so much more obligatory than any law of man, that the duty of obeying the law of God, is the foundation of all the rights of conscience—that conscience is in fine the expositor of the will of God? It may be said, that the testator had in his view, some fantastic notion of the origin and obligations of conscience, inconsistent with, or independent of, a belief in the being of a God, or of the truth of Revelation. What proof or evidence is there of this in his will? Does he not leave to the trustees and professors, the liberty of teaching these rights in that way, which in their judgment they shall think the most effectual, and the most approved among men? Does he not in effect, enjoin this upon them, when he enjoins them to do it by *every proper means*? May they not, must they not, enlighten the faculty in their pupils, improve its discriminating power, exercise them in reflecting on the moral character of their actions, on the character of their Creator and Redeemer, and in referring themselves ultimately to the Supreme law derived from Revelation? Beyond all doubt he does leave it to them, without restraint, without a word or syllable to turn them from the path they shall think best. Beyond doubt it is their duty to walk in that path: and they cannot take any path that leads to a right notion of conscience, that will not lead to the belief of a Supreme Judge and Sovereign, of whom conscience is the deputed

governor in the human heart, and also to the desire of learning and obeying his will, whether inscribed on the heart itself, or revealed in his word.

Whoever reads this will by its own light only, and this is all that the court have to guide them, must therefore see that there is nothing in it like an interdiction of instruction in the principles of the Christian religion; and I contend for this the more strenuously, because the trust I confidently believe must be executed, and I should deprecate it as a great public evil, as well as a perversion of the will, to have a doubt remain of either the right or the duty of the trustees to give this instruction.

The exclusion of Christian ministers is to be traced to a circumstance widely different from any thing like an aversion to Christianity. In the establishment of a large orphan school, to be composed of children of various religious denominations, and of some without any religious training or name whatever, the testator's difficulty in this particular was not inconsiderable. It is the case not only of a school, but of a family—of a family by itself—and separated for the most part from the world. If he should place it under the religious visitation of one denomination, there might be peace within, and finally perhaps one religious system; but the benefits of the school itself might be thereby limited to one or a few classes, and this would have defeated or impaired his design, which was catholic and universal. If he made no exclusion of any, but left the ministers of all religious denominations to claim the preference, to which each thinks itself entitled, could he expect that they would unite in some common platform of religious instruction, acceptable to all? He had little reason from any personal experience to hope for such concord. Would the Bible itself be a point of union for every one? Do all denominations adopt the same canon—even the same translation? With respect to the elements of Christian belief—do they all concur in them? Will they all agree in any summary of them for the instruction of children? Do they agree in what constitutes a capacity in children to receive such instruction profitably—to become recipients of Christian grace? A conscientious Churchman might and would say, upon entering on the religious visitation of such a family—"My first duty to them, to myself, and to God, is to impart the rite of baptism to the unbaptized; they cannot otherwise be made members of Christ." An equally conscientious Baptist, might and would say,—"Not now. Postpone it to riper years." An equally conscientious Quaker, if he took part in any such community—which for the love of peace he commonly does not—would say—"Neither now nor then. The baptism of water is of no necessity, nor efficacy, at any age." No minister of Christ thinks himself a sectarian. Many of different denominations concur in many things. Many conscientiously differ in many things, and after

most grave deliberation upon them. With the most conscientious and the most reflecting, there are perhaps the fewest non-essentials among their points of belief. The distinction between what is fundamental and what is not, is more frequently a distinction of laymen than of ecclesiastics, perhaps because laymen ponder the weighty subject less seriously. We are not without public examples of these differences at the present day, which it is unnecessary to do more than point at. They are the great obstacle to the full success of our public schools. Without religious instruction, what will they be, and what will they produce? With it, if there is to be no common accord, the question may be repeated, what will they be, and what will they produce? The law does not overcome the difficulty. Ecclesiastics it is feared will not. If laymen cannot, where is the evil to end? And what will the influences of the evil be, not upon pupils who have a home and a mother to supply in part the deficiencies of the school, but upon the members of an orphan family, who are to find all influences upon their hearts and minds within the school, or to find them no where?

The difficulty was too much for Mr. Girard. It would have been perhaps too much for any one. It lies in the universal comprehension of orphans of all religions, without imposing upon them some specific form of Christian instruction. It is perhaps inseparable from such a scheme. But he had a right to comprehend all, and he had a right also to the opinion, that it was not fitting to impose upon them any specific form of Christian instruction. He chose, therefore, as the only remaining resource, to exclude from his school, ministers of every denomination, and to leave the whole matter to laymen. He may have been wrong—he may not have chosen the least of two evils in the administration of his school; but if the law left him free, he had a right to choose for himself, and it is not for any tribunal of law to limit or to question his choice, or to denounce it as a scheme to dishonour and to exclude religion itself.

And has not the law left him free? Without doubt it has. There is no law that says Christianity shall be taught in our schools, by Christian ministers. Is there any law that says it shall be taught at all? The Constitution is at the remotest distance possible, from doing the mischief to Christianity, of imposing its faith upon any one. It stands, and will stand, by its own principles and sanctions. The Constitution removes and prohibits restraints. It imposes none. "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man can of right be compelled to attend, erect, or support, any place of worship, or to maintain any ministry against his consent. No human authority can in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to

any religious establishments or modes of worship." *Art. IX. sec. 3.* "No person who acknowledges the being of a God, and a future state of rewards and punishments, shall on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this Commonwealth," *Art. IX. sec. 4.* Christianity is a part of the law of Pennsylvania, it is true; but what Christianity, and to what intent? It is Christianity without particular tenets—Christianity with liberty of conscience to all, and to the intent that its doctrines shall not be vilified, profaned or exposed to ridicule. It is Christianity for the defence and protection of those who believe, not for the persecution of those who do not. This is the utmost reach of the *Commonwealth v. Updegraff*, 11 Ser. & Raw. 400.

If the teaching of Christianity is enjoined by the law, what are the principles, what the creed? What has the Legislature of Pennsylvania done for our public schools—what can it do? We may lament this, and we may be wise or unwise in lamenting it; but we have formed our political community, upon principles that do not permit us to do any thing but lament it.

The notion, however, that the Christian religion cannot be taught by laymen, is a pure extravagance. It is taught by laymen in the most efficient of our schools for Christian instruction,—our universal Sunday schools, the greatest and best of modern institutions. In the Liverpool Blue Coat School, even the doctrines of the Church of England, its creeds and articles, are taught by laymen—no clergymen whatever, either officiating or superintending the school—the pupils themselves reading by turns and as a reward of merit, such parts of the service as the laity can repeat. It is equally extravagant to assert, that any Protestant denomination in this country prohibits such lay teaching of religion—lay teaching in schools. It is sufficient, however, that Mr. Girard has not prohibited it. He has not prohibited the institution of a Sunday school upon the premises. Nay, he has not prohibited his trustees, from sending the pupils to their respective churches, if they or their friends have any, without the walls; and this they may do, without hearing of clashing doctrines or sectarian controversy—unless the ministers respectively shall think they are fit themes for the edification of their flocks.

There is nothing even in the suggestion, that religious offices cannot be performed by ministers, to the sick or dying orphans within the walls. In point of law there is nothing, because the pupils enter voluntarily, and when they enter, they must do so by express direction of the testator, under the sanction of the law, and the law will protect all their legal rights. But there is nothing in the will to offend even a scruple;—for the power of the trustees for the accommodation of the pupils, to erect an in-

firmly without the walls, is left by the will without restraint, either express or implied.

The sum of the objections then, may be condensed into these propositions:

1. That the clause of exclusion is opprobrious to Christianity, and is entitled to no favour.

If it be opprobrious, so is the Constitution of New York, which prohibits all ecclesiastics from holding any office or place civil or military within the State; and if the post of a schoolmaster in a public school, be a place, excludes him from teaching in such a school. So is the law of the English Parliament, which excludes a clergyman from a seat in the House of Commons. So is every public and private measure, that for any cause, even for the preservation of the due influence of this honoured class of men, separates them from secular cares and charges of any kind. It is the great distress of their case, that compels the complainants' counsel to rely on such an objection. We ask no favour—we stand upon the law, which is the same for all who obey it, and for all lawful cases, whether of charity or contract.

2. That Christian instruction is inseparable in law from a charity school. Charity has no foundation but in Christianity. The law will not acknowledge a charity that Christianity rejects.

This is in direct conflict with settled and incontrovertible law. A charity school for Jews would upon this principle be illegal; whereas it is perfectly settled in England, that although a legacy to propagate the Jewish religion is invalid, a charity for the maintenance and education of poor Jews, is good; *Da Costa v. De Paz. Ambl. 228, S. C. 2 Swanst. 487—note, Mocatto v. Lousado, cited, 7 Ves. 423*; even though a Jewish priest be a distributor of the bounty. *Isaac v. Gomperts, 1 Ambler, (Blunt's ed.) 228—notes*. The last decisions in England give the true distinction. The law of charity has its origin in the precepts of Christianity. Christianity rejects no charity that brings knowledge to the ignorant, or succour to the poor. But there are charities for propagating the doctrines of religion, and charities for education and other objects, with which the doctrines of religion have no necessary connexion. They are two streams of charity from the same source. They may be made to unite and run together at the option of the giver; but the law does not compel the union. A charity to propagate a religion not tolerated by law is void; but if a Protestant in England shall found a grammar school, although “the court, in the absence of other evidence, can only establish it on the principle of religious education forming part of the plan, and of that religious education being according to the law of the land,” yet if there is other evidence, it will be established in conformity with the evidence—

even for Jews, who reject Christianity, and whose religion the Law of England does not tolerate. *Attorney-General v. Dean and Canons of Christ Church*, Jac. 485. Boyle regards the opinion of Sir Thomas Sewell, in *Isaac v. Gomperts*, to have been in point of law, that "religious instruction is not a necessary part of education," and that if the purpose of the testator does not require it, it may be carried into effect "without regard to religion at all;" and he says also, with perfect truth, that Sir Thomas Plumer, in the case last cited, supports the same opinion. *Boyle*, 43, 44. This it must be observed is the law in a land, where there is an Established Church, and where there is no toleration except for Christians of a certain faith. It is English toleration of schools for Jews, who reject Christianity; and less is extended by the complainants and their counsel, in this land of universal toleration, to the school of Mr. Girard, who does not reject it, but only omits expressly to require it.

3. That the conscience of parents and pupils is violated by the exclusion of the Christian ministry.

And have the founders of schools no conscience to be respected? Is the conscience of the giver to pass for nothing? Can those who may refuse the bounty altogether, on the terms on which it is given, set up their conscience to destroy the gift? Or rather are the rights of conscience to be made a pretext for destroying the charity, that none may enjoy it, even when their conscience consents?

Finally, I submit to the court, that if this exclusion or restriction in the testator's will is illegal, it is for that reason null and absolutely void, and the consequence is not that the charity fails, but that the restraint—the condition—is defeated, and the court must establish the charity according to their sense of the law. It is a condition subsequent to the gift. The estate has vested in the trustees, and this restraint or condition is a restraint upon its use. If the restraint is illegal—the use is not bound by it. The complainants gain nothing by the objection, but the unenviable satisfaction of holding up their benefactor to judicial censure, and possibly to more general reprehension.

The validity of this use, as well as charitable uses generally, at common law, being thus, I trust, established, the second point of my argument occurs.

II. *The city being in complete possession of the estates, and proceeding in the execution of the trusts, nothing more is necessary for them. They want no remedy either at law or in equity; and it is of no importance therefore, whether such a remedy can, or cannot be had, if it is wanted.*

The mere statement of this point is decisive of the complainants' bill. If there was no remedy at all at common law for a charitable use, which it would be absurd to say,—if a charitable

use were at the common law a thing lying in occupancy, yet we are the occupants. The best remedy would only place the city where she is now, by the integrity of the testator's executors, and the tenants of the testator's estate.

The opinion expressed by this court in *The Baptist Association v. Hart's Exec'rs*, or rather the argument of the venerable Chief Justice, 4 *Wheaton* 30 to 39, does undoubtedly affirm the proposition, that Chancery gave no protection to charitable uses before the 43 *Eliz.*, or otherwise than by virtue of that statute. This is a proposition which it will be my duty to examine hereafter. But what if it be sound? What if a Court of Chancery would not protect it? Can it be maintained that Chancery, at any period of its history, would *destroy* a trust that was good at law? We are now in a Court of Chancery, and the complainants are asking the court to declare a trust good in law, to be void. All judicial history, all precedent, all reason are against it.

If this case were a suit at law, an ejectment, the plaintiffs could not recover in opposition to the cestuy que trusts, though no valid trustee were interposed. This was decided in *The City of Cincinnati v. White*, 6 *Peters*, 441, a case of dedication to public use, where the giver at the time of the dedication, had only an equitable title, but obtained the legal title before he brought suit; and there are many cases in this court to the same effect. A person in possession, who is not a wrong doer, cannot be turned out by ejectment. *Doe v. Jackson*, 2 *Dow. & Ry.* 523. If there be no trustee, and the use be good, the party having the legal title is the trustee; but he cannot even at law, disturb the cestuy que trust, who is in possession; nor consequently one who is in possession for him; *Brown v. How*, *Barnard. Rep.* 354; *Attorney-General v. Gore*, *id.* 145, *Blake v. Bunbury*, 1 *Ves. jr.* 194, 514, 4 *Bro. Ch. Rep.* 20; unless, indeed, it appears that the creator of the trust intended that the cestuy que trust should not have the possession, and the trustee is claiming it for the cestuy que trust. *Tidd v. Lister*, 5 *Madd.* 429. Still more plain would be the answer at law, if the heirs were asking to recover the personalty from the executors, who are trustees for the charity, if there be no other.

This is the favour we should have at law, who though a nursing mother to her own children only, will nevertheless not cast out the children of equity, if they can cover themselves even with the scant legal garment of rightful possession: but here the complainants are asking equity herself to destroy her own offspring—to take the nursling out of the hands of her elder and harsher sister, that she may strangle it on her own bosom. Such an infanticide was never before perpetrated, never before asked. On every principle, if the trust is good at law, the decree must be affirmed, although none other of my points can be sustained. But

III. *The defendants are entitled upon general principles, and by the constitution of a court of equity, to have their valid trust protected in this court, whatever may be the defects of the legal estate.*

I do not at present say, that in the case of charitable uses, this was so settled before the 43 *Elizabeth*; but I do say, that generally where a trust is valid, it is a fundamental maxim and principle of equity, and has been so from time immemorial, that the trust shall be protected and enforced by a court of equity.

In all the fiery controversy between Lord Coke and Lord Ellesmere, in regard to the authority of Chancery, the former never questioned this principle.

It was so settled by solemn adjudication before the Charter of Pennsylvania, and came to that colony as a part of the code of English equity.

We cannot conceive of a Court of Equity, without this maxim as one of its leading principles.

Whether the city can or cannot take the estate devised by the testator,—whether the estate of the grantee, donee, or devisee be void or not, fail or do not fail,—whether there be a trustee or not, are matters of no importance to the trust itself in a Court of Equity.

It is without any exception true of all *lawful* trusts. An exception cannot be shown, for the rule has no exception. The universal rule in equity is, that a trust shall not fail for want of a trustee; and if one is wanting, the court will execute the office: and this for an unanswerable reason, that in equity the trust is the estate. The land or the money, in whose hands soever it comes, is bound by the trust, if the legal estate was taken with notice of the trust.

I shall cite a few authorities, not for the general principle, but for the emphatic and universal manner, excluding all exception, in which it is expressed.

“Trustees either are such by the express or implied declaration of the party, or are made such by a Court of Equity. In a Court of Equity, it is sufficient that the trust appears; and if the party creating the trust, has not appointed his own trustee, the Court of Equity will follow the legal estate, and decree the person in whom it is vested, to execute the trust, it being a rule *which admits of no exception*, that a court of equity *never* wants a trustee.” *Co. Litt.* 290, b.—note 1, sec. 4, by *Butler*.

“The general rule is, that a trust shall *never* fail of execution for want of a trustee, and that if one is wanting, the court shall execute the office.” *Co. Litt.* 113, a.—note 2, by *Hargrave*.

In *Locton v. Locton*, 2 *Freem.* 136, in 1627, where testator devised lands to be sold, and the proceeds distributed between the daughters of H and B, Lord Keeper Coventry decreed the heir to convey.

In *Walker v. Doyle*, 1 *Cha. Ca.* 180, in 1655, where executors, who were authorized to sell lands for payment of debts, died before sale, the Lords Commissioners decreed the heir to sell: and they decided the same in *Tenant v. Brown*, 1 *Cha. Ca.* 180, in 1659.

In *Garfoot v. Garfoot*, 1 *Cha. Ca.* 135, in 1663, where lands were devised to be sold by the executor, and he died, and the heir demurred to a bill against him for a conveyance, the demurrer was overruled.

The expression, that the trust *is tied to the land*, was used at least as early as *Gwilliams v. Rowell*, *Hardr.* 204, in 1661. All these cases were before the date of the charter to William Penn.

The principle was never applied for the benefit of particular persons only, or of particular trusts. Trusts are executed in equity for all persons indiscriminately. Testamentary powers are in the nature of trusts, and the same rule is applied to them. So also imperative powers, whether by will or deed. *Co. Litt.* 113, a., *Mr. Hargrave's note on trusts*. Neither the negligence of the donee, nor accident, nor any other circumstance, is permitted to disappoint the trust. *Brown v. Higgs*, 8 *Ves.* 574. *Pitt v. Pelham*, 1 *Cha. Ca.* 176, in which Lord Keeper Bridgman ruled the contrary, because the implied power of the executor to sell for distribution among legatees, never could arise, and was void at law, as it was to be executed after the death of the donee, was reversed by the House of Lords, and the heir was decreed to convey. 1 *Sugd. on Powers*, 135; 2 *Sugd. on Pow.* 174.

The strength with which the principle is stated in some cases, is the greatest possible.

In the *Attorney-General v. Downing*, Lord Chief Justice Wilmot reiterates the principle again and again. "I take it to be a first and fundamental principle in equity, that the trust follows the legal estate wherever it goes, except it comes into the hands of a purchaser for a valuable consideration without notice." *Wilmot's notes*, 21. "Trust estates do not depend upon the legal estate for an existence. A court of equity considers devises of trusts, as distinct substantive devises, standing on their own basis, independent of the legal estate, or of one another; and the legal estate is nothing but the shadow, which always follows the trust estate, in the eye of a court of equity." p. 22. "The individuals named as trustees, are only the nominal instruments to execute that intention; and if they fail either by death, or *being under a disability to act*, or refusing to act, the Constitution has provided a trustee." p. 24.

In the *Attorney-General v. Hickman*, 2 *Eq. Ca. Abr.* 193, the case of a charity, where the trustee died before the testator, and the legal estate created by the will, failed altogether, Lord King

nevertheless established the trust. *Eales v. England*, *Prec. in Chan.* 202, ruled by Sir John Trevor, is to the same point. *Sonley v. The Clockmakers' Co.*, 1 Bro. Ch. Rep. 81, before cited, is the same, the legal estate having been absolutely void.

Lord Thurlow says in *Moggridge v. Thackwell*, 1 Ves. jr. 475, "it is known *universally*, that a trust legacy cannot lapse because the trustee dies, but it survives for the benefit of the cestuy que trust."

No one has stated the rule more strongly than the author of "Commentaries on Equity Jurisdiction as administered in England and America." "It is a *settled principle* in equity, that a trust shall *never* fail for want of a trustee." 2 *Story's Equity*, 320, sec. 1059.

Lord Nottingham, in 32 *Car. II.*, two years before the charter of Pennsylvania, applied the principle in a very striking case. An impropiator "devised to one that served the cure, and to all that should serve the cure after him," all the tithes and other profits, &c. Though the curate was incapable to take by this devise in this manner, *for want of being incorporate, and having succession*, yet it was decreed that the heir of the testator should be seized in trust for the curate for the time being. 2 *Ventr.* 349. *Anon.*

Now in none of the cases, or books, which I have cited, is the statute of 43 *Eliz.* or any other statute, said to be the foundation of the court's power. The statute is not mentioned. It could not be. It is not a principle borrowed from charitable uses. Nay—charitable uses have taken benefit of this principle from the great code of equity. Sir John Leach says, "The jurisdiction of courts of equity, with respect to charitable bequests, is derived from their authority to carry into execution the *trusts* of any will or other instrument, according to the intention expressed." *Attorney-General v. Ironmongers' Co.*, 2 *Mylne & K.* 581; *Shelford*, 630.

And all the principles of English equity belong as much to Pennsylvania as to England. Gentlemen, not familiar with our system, perplex themselves by occasional cases which show the want of equity *powers* in the tribunals of that State—or rather of equity forms and modes of administration. In an early stage of the colony, there were courts of equity, with all the usual powers. They ceased to exist. Certain equity powers were afterwards used by the common law courts, without legislative authority. They were indispensable, and the right to use them became established by time. Others were subsequently given by the legislature, under the authority of the State Constitution; and in certain cases, all the powers of Chancery have been given by recent laws. But equity *principles* have never fluctuated with these powers. From the first day of the colony to the present hour, they have been acknowledged, adopted, and applied,

universally, sometimes it must be admitted defectively, because the power of application was defective; but whenever, either directly or circuitously, the powers of a court of common law could apply to the principles, or wherever the principles required no power to administer them, as in the case of equitable rights or titles in possession, there the maxims and principles of the English Chancery have been enforced. I will hereafter, in a general view of the Pennsylvania law, cite the authorities to support these positions.

After this statement of the principles of Chancery in regard to trusts, not only is there no doubt of our full title to the benefit of them in this case, as a case depending upon the law of Pennsylvania, but it is material to remark, that in the *Baptist Association v. Hart's Executors*, in 4 *Wheaton*, this view of the subject was not presented nor taken. Surely a charitable use, that is good at common law is a trust. Of what importance is it then, whether there is any sufficient evidence before the court, that Chancery in England, had protected such specific trusts before the 43 *Elizabeth*? That court by its original jurisdiction—by its very constitution—from the necessity of its nature—has always protected all lawful trusts. Admitting the trust to be lawful, it seems to me to be an abandonment of one of the great heads of Chancery jurisdiction, to omit bringing to bear upon the question, the undoubted jurisdiction of that court over all trusts. Virginia and Maryland, who have followed the Baptist Association case, and under the sanction of that argument, have rooted out charities perhaps altogether, must judge for themselves; but unless they deny that a charitable trust is a trust, I confess my inability to perceive, how the repeal of the statute of 43 *Elizabeth*, or the non-adoption of that statute, can take charitable trusts out of the protection which Chancery gives by its original jurisdiction and constitution to all trusts. If the uncertainty of the objects, and the want of trustees to select them, be no objections,—if the trusts are good and valid trusts at law,—then I submit, it cannot be an objection, that there is no statute to give Chancery a jurisdiction over them, unless Chancery has no general original fundamental jurisdiction over trusts at all.

It has been contended, nevertheless, that courts of equity in England, originally exercised the power of protecting charitable uses, only by or under the statute 43 *Elizabeth*, and that where the statute does not extend, or has not been adopted, they have not the power. In other words, it is argued that charitable trusts are excepted out of the general jurisdiction of Chancery over trusts. In answer to this I proceed to show:

IV. *That charitable uses enjoyed the protection of Chancery, before the 43d Elizabeth, by the original jurisdiction of that court, and have enjoyed it ever since.*

This is a question of juridical history—a question of fact. If it should be settled against us, what would it conclude, seeing that Chancery confessedly has exercised this jurisdiction by original bill for more than two centuries, and had exercised it for nearly a century between the date of the statute, and the date of the charter to Wm. Penn?

It was not settled till *Pitt v. Pelham*, in 1671, that Chancery would decree a sale or conveyance by the heir, for distribution among legatees, where the power given by the testator was void at law in its creation. Would a court of Chancery any where in these States, hesitate to follow *Pitt v. Pelham*, for this reason? The first case of a bill in Chancery for partition, was in *Speke v. Walrond*, in 40 *Eliz.* 1598; *Tothill*, 155. Mr. Hargrave speaks of it, as “a new compulsory mode of partition that has sprung up;” but he has the good sense to add—“and is now fully established.” *Co. Litt.* 169, a. note 2. What difference does it make at this day, that from the year 1601, only, and no earlier, Chancery has by usurpation gained a power over charitable trusts, that she did not exercise before, and never ought to have exercised at all. After the stream has run clear and undisturbed so long, are we to refuse to drink of it, because of old there was a quarrel at the sources that troubled the waters? Equity jurisdiction is as much a matter of precedent as law, and if one hundred years’ uninterrupted exercise of it, will not suffice, neither would a thousand.

In the famous report to King James, in 1616, which settled the controversy between Lord Ellesmere and Lord Coke, the Commissioners did not go back for precedents to an earlier reign than Henry VII., which began in 1485, and they refuted Lord Coke forever by finding them in that reign and subsequently. *Jurisdiction of Chancery vindicated*, 21, appended to 3 *Rep. in Chancery*. 1 *Collect. Jurid.* 39.

But the question of fact as to the jurisdiction of charitable uses recurs.

Having in this country especially, but very imperfect means of investigating the question of fact, we ought, I suppose, to trust to the general current of professional opinion in England, as very safe evidence in the main; and protesting as I do, that after a not careless research, there is to be found, in the course of two centuries and a half, but one solitary *dictum*, in 1798, by Lord Loughborough, that questions the jurisdiction of equity in cases of charitable trust before the 43 *Elizabeth*. I aver that the general current, both of professional and judicial opinion, is decidedly in favour of the immemorial, original jurisdiction of Chancery in such cases.

The evidence I have to adduce in the first place, is the actual exercise of original jurisdiction by Chancery, without any question, so soon after the *43d Elizabeth*, as to make it impossible to regard it as an usurpation; and the declared sentiments of a succession of the most eminent chancellors, and equity lawyers, from that time to the present, in favour of it.

The *43d Elizabeth*, c. 4, was passed at a session of Parliament, which began the 27th October, and ended the 19th December, 1601. Sir Francis Moore, in his readings upon the statute, which he drafted, and Duke, in his *Law of Charitable Uses*, give several cases of the exercise of this jurisdiction, without suggesting a doubt of its propriety.

Payne's case, *Duke on Char. Uses*, 154 (Bridgman's ed.), cannot be fixed precisely in point of date. It was probably immediately before or after 3 *James* 1, in 1604. Commissioners under the statute had decreed a charitable use to find a chaplain *ad divina celebranda*. The Lord Chancellor, on the ground that such a use was not inquirable within the statute, annulled the decree, but "by his chancery authority might and did decree the land to the use."

In *Guiddy's case*, in 4 *Jac.* 1, an heir was compelled by decree in chancery to surrender a copyhold to the vendee of the devisees for a charitable use.

Blackstone v. Hemworth Hospital, *Duke*, 644, 11 *Jac.* 1. A vicar and churchwardens exhibited their bill in Chancery to have a charitable use established, and the Master of the Rolls, Sir Edward Phillips, made a decree. A second bill was filed by other parties, alleging that the first was exhibited by practice, and Lord Ellesmere gave his opinion in the case, though it does not appear that he made a decree,—the original jurisdiction of Chancery not being questioned in either cause. Lord Keeper Coventry afterwards ordered a commission to issue, there being jurisdiction either way.

Hynshaw v. Corporation of Morpeth, *Duke*, 142, 5 *Car.* 1, 1629; 2 *Gibson's Codex*, 1158—note y. A commission was granted to reform a breach of trust by a corporation, who were visitors of a free school and also the trustees. The corporation refused to appear, on the ground that by the second proviso to the statute, the commissioners had no jurisdiction. Though the question was then of the first impression, and not clear, Lord Keeper Coventry declared that the commissioners might proceed, the visitors being trustees, saying—"that if it should be otherwise construed, this breach of trust would escape unpunished, *unless in Chancery*, or in Parliament, which would be a tedious and chargeable suit for poor persons."

Mayor of London's case, *Duke*, 380, 15 *Car.* 1, 1639. Sir John Finch, Lord Keeper, established a charitable use in Chancery, of which the commissioners had clearly no jurisdiction.

Chelmsford Poor v. Mildmay, Duke, 574, Mic. 1649. The Lords Commissioners reversed a decree of commissioners, on the ground that they had no jurisdiction, and ordered a bill to be filed in Chancery.

Attorney-General v. Townsend, Duke, 590, 22 Car. 2, 1670, upon an information in Chancery, Lord Keeper Bridgman established by decree a charitable use for the relief of the poor of B. *Duke*, a very accurate reporter, makes a note to this case. "Where the deviser gives all the estate, or the surplusage of his estate, to the poor, there, the proper way to have the same applied to charitable uses, is *by information in Chancery.*" Sir Francis Moore says, "If a man bequeath three hundred pounds, to be let out at five per cent. by the churchwardens of each parish, this legacy is not within this statute; but yet *the Chancellor may give remedy by equity in Chancery.*" *Duke, 136.*

There was a doubt at one time, or so the early reporters in Chancery represent, whether in a case that was within the statute, the use could be decreed except upon commission; that is to say, whether the statute had not ousted the original jurisdiction of Chancery in such cases, though it existed in all others; and by reference to this doubt, all the apparent inconsistencies in the early cases are resolved. An instance may be seen in *Attorney-General v. Newman, 1 Cha. Ca. 157, 21 & 22 Car. 2, 1669,* where that great lawyer, Sir Orlando Bridgman, Lord Keeper, declared, that "The king as *pater patriæ* might inform for any public benefit for charitable uses before the statute of Elizabeth." "But it was doubted," says the reporter, "the court could not take notice of that statute, so as to grant a relief according to that statute upon a bill; but that the course prescribed by that statute, by commission of charitable uses, must be observed in cases relievable by that statute. But no positive opinion was delivered, for the defendant consented to a decree." The doubt may have existed, though it is a little remarkable, that the same reporter in a prior case in his own book, *West v. Knight, 1 Cha. Ca. 134, 21 Car. 1,* before the Master of the Rolls, Sir Harbottle Grimstone, says that the master had ordered a search for precedents, and had found one on the very point, that Chancery might relieve upon original bill in a case within the statute. It was the settled construction in Chancery, from the time of Lord Ellesmere, that express words in a statute are necessary to oust the jurisdiction of Chancery. This principle was his main defence against the statute of *Præmunire*, with which Lord Coke threatened all the officers of Chancery. Except so far as the statute of Elizabeth may have ousted the jurisdiction of Chancery in certain cases, the unlimited jurisdiction of the court over charitable trusts, seems never to have been questioned, until the time of Lord Loughborough; and it results, that while

in the Baptist case in this court, and in the Virginia and Maryland cases, which followed it, the decisions against the charity were founded on the hypothesis that Chancery got its jurisdiction only from the statute, the doubt of Lord Keeper Bridgman, and some of his predecessors, was whether the statute, in all the cases that it provided for at all, had not taken it away.

It is easy to perceive that the mind of the late Chief Justice of this court, was to some extent influenced in its impressions against the general jurisdiction of Chancery, by two or three cases, that will be found upon examination to have been defectively reported.

The case of the *Attorney-General ex. re. St. John's College v. Platt, Finch*, 221, was one of them.* The point decided in the case by Sir Heneage Finch, Lord Keeper in 27 Car. 2, 1675, is simply that a charity must be accepted on the terms on which it is given, and cannot be altered by agreement between the heir of the donor and donees; a point that cannot be disputed. But the reporter at the beginning of the case makes the following remark, for which only the case was cited by Chief Justice Marshall. "The testator died, and Robert Platt, as brother and heir, entered, pretending that the devise was void, *because the name of the corporate body was not fully expressed*; and this being referred by the Lord Keeper Lyttleton, to have the opinion of the judges, they certified that the devise was void in law, but that it was a good limitation in equity, within the statute of charitable uses;" from which the inference was drawn, that it was only under the statute that the use could be established.

Lyttleton was appointed Lord Keeper by Charles I. in 1640, and died in 1645. *Parke's Hist. of Ct. of Chancery*, 112, 117. He was not an equity lawyer of reputation. Parke calls him an "unworthy incumbent." But he must have known too much of equity as well as of law, to have sent such a question of misnomer to the courts of law at all, and especially after the Mayor of London's case, decided in Chancery the year before his appointment, *Duke*, 380—and the case of *Lynne Regis*, decided thirty years before, on solemn argument in the King's Bench. 10 Rep. 123, a. But if he did send such a point to the law judges, it must have been thirty years before the time of Finch's report, and the reporter was therefore not likely to know any thing personally about it. He certainly knew nothing about it accurately.

The same case was referred to by the Chief Justice, as also

* *Cases temp. Finch*, is a book of no authority. See 10 Ves. jr. 582; 1 Wils. 162; 3 Atk. 334; *Wallace's Reporters*, 53. I have pleasure in referring to a very useful and well prepared work of Mr. J. W. Wallace, of the Philadelphia Bar, entitled "The Reporters, chronologically arranged, with occasional remarks upon their respective merits." Some such work as this is essentially necessary to guard against the indiscriminate reception of the old Reporters, especially the Chancery Reporters, as authority.

reported in 1 *Cha. Ca.* 267, as *Anonymous*. This book is "of notoriously doubtful authority." *Wallace's Reporters*, 52. Here the reporter says, "Prat devised his houses in Sepulchre's parish, to St. John's College, he being *tenant in capite*, and the corporation misnamed, which was a void devise to pass lands, and so on former proceedings certified by the opinion of the judges. The Lord Keeper, notwithstanding, decreed it a good appointment for a charitable use within the statute of 43 *Elizabeth*. But then it was objected that if so, yet the process and method appointed by the statute ought to be held. But the Lord Keeper decreed the charity, *though before the statute no such decree could have been made*." All this is obviously the language of the reporter, and is not the language of Sir Edward Lyttleton who died thirty years before, nor of Sir Heneage Finch, the Lord Keeper, before whom the cause came on, upon another point in 1675, nor is the reporter's opinion of any the least weight. Now, however, we get the new facts that the testator was *tenant in capite*, and that the Lord Keeper on his own judgment decreed the will a good appointment.

This case is again stated in *West v. Palmer*, 1 *Cha. Ca.* 134, in 21 *Car. II.*, 1669, before the Master of the Rolls; and there the decree of *St. John's College v. Platt*, is said to have been made 30th June, 1657, where upon advice of four judges, it was resolved "that upon original bill the Chancery might relieve within the statute of charitable uses." Here is a third version, entirely different from the other two, but the time of the certificate is inaccurate. The doctrine of it is unquestionable, it being only that the Court of Chancery might establish a charitable use by original bill, notwithstanding the charity was within the statute. There is no probability, however, that any Lord Keeper would have asked the advice of the law judges, upon a point of equity jurisdiction, and therefore we may fairly infer inaccuracy in this, as much as in the previous statement.

A fourth report, and different from all the rest, is *Plate v. St. John's College, Duke*, 379, where it appears that the deviser was *tenant in tail*, and yet Lord Keeper Lyttleton held the devise of the college good by the statute 43 *Elizabeth*, deciding himself, that the error in the corporate name was of no importance, and not sending to the law judges for their opinion on any point.

Nothing is to be obtained from these reports, except perhaps the last, that is worthy of any reliance as a true history of the case—and even the decision, as Duke reports it, is rejected as being contrary to all principle, in *Rumbold v. Rumbold*, 3 *Ves. Jr.* 70.

Collison's case, Hobart, 136, 15 *Jac.*, is another of the cases cited in *The Baptist Association v. Hart's Ex'rs.*, as having been referred to the judges, who certified that the case was within

the relief of the 43 *Eliz.*—for “though the devise was utterly void, yet it was within the words *limited and appointed* for charitable uses.” The impression made by the report on the mind of Chief Justice Marshall, undoubtedly was, that this was an original bill in Chancery; whereas, by referring to *Roll’s case, Moor*, 888, the same case under another name, it appears clearly to have been an appeal from commissioners under the statute. It was a devise before the statute of wills, and the house devised as a charity, was not devisable by custom nor “*estated to any use.*” The only question therefore, was, whether the commissioners, under the true interpretation of the 43^d *Eliz.*, could decree the charity in such a case; and the judges having advised that such was the interpretation of the statute, Lord Bacon, Chancellor, confirmed the decree. The case has no bearing whatever upon the original jurisdiction of Chancery.

I may therefore return to the statement of authorities in favour of that jurisdiction, which has been suspended for these remarks on the cases referred to in *The Baptist Association v. Hart’s Executors*.

In *Attorney-General v. Matthews*, 2 *Lev.* 169, 28 *Car. II.* 1675, the Lord Keeper, Sir Heneage Finch, quashed a commission, where the devise was to the poor generally, and ordered an information in Chancery.

Lord Somers in *Carie v. Bertie*, 2 *Vern.* 342, 1696, asserts expressly that charities generally fell under the care and direction of Chancery.

In the case of *Eyre v. The Countess of Shaftesbury*, 2 *P. Wms.* 119, in 1725, before the Lords Commissioners Jekyl, Gilbert and R. Raymond, the court say—“In like manner, in the case of charity, the king *pro bono publico*, has an original right to superintend the care thereof, so that abstracted from the statute of Elizabeth, relating to charitable uses, and *antecedent to it*, as well as since, it has been every day’s practice to file informations in Chancery, in the Attorney-General’s name, for the establishment of charities.”

Lord Hardwicke’s decisions and opinions are full in several cases to the same point. In *Attorney-General v. Locke*, 3 *Atk.* 165, in 1744, he says, where there is a general destination to the poor, the relief *must* be by original bill.

The case of the *Attorney-General v. Brereton*, 2 *Ves.* 425, in 1751, was a very strong one. The *Statute 29 Car. 2, c. 8*, relating to augmentations of vicarages, directed that the most favourable construction should be given to grants for such objects, and such further remedy “as heretofore hath been, or may be had for other charitable uses upon the statute for Charitable Uses.” Lord Hardwicke. “These augmentations are charities to be sure; but at the latter end of that statute, is a clause which considers them as charities under 43 *Elizabeth*. This is not indeed

a proceeding by way of commission of charitable use, which is founded on that statute, but it is by *the old way* of proceeding, in the name of the Attorney-General *in this court* for the charity. But that proceeding is not confined to cases considered as charities before the statute of Charitable Uses, but all others are taken to be within the extensiveness of this proceeding, in the name of the Attorney-General, which may be applied here." This is not only a clear assertion that the jurisdiction, by information, or original bill, extended to all cases of charities *before* the statute, but that it was to be applied to cases declared to be charities by statute afterwards.

The whole argument of Lord Hardwicke, in the *Attorney-General v. Middleton*, 2 Ves. 327, in the same year, is to the same effect. It was an information against the masters and governors of a school, founded by charter from the crown, for a wrongful exercise of power in the charity, they being at the same time visitors by charter. Lord Hardwicke dismissed the information, because the school must be regulated in the first instance by the charter, and not by application to a court of equity; but his remarks on the jurisdiction of the court generally, are decisive. "Consider the nature of this foundation. It is at the petition of two private persons, by charter of the crown, which distinguishes this from cases of the statute of Elizabeth on Charitable Uses, or cases before that statute, in which this court exercised jurisdiction of charities at large. Since that statute, where there is a charity for the particular purposes therein, and no charter given by the crown to found and regulate it, unless a particular exception out of the statute, it must be regulated by commission. *But there may be a bill by information in this court, founded on its general jurisdiction.*" "This is clearly not a case within the statute of Charitable Uses, but excepted out of it, for this is a free school, which has special governors appointed by the founder. It is true that an information in the name of the Attorney-General as an officer of the crown, was not a head of the statute of Charitable Uses, *because that original jurisdiction was exercised in this court before*; but that was always in cases now provided for by that statute, that is, charities at large, not properly and regularly provided for in charters of the crown."

In the *Attorney-General v. Tancred*, 1 Eden 10, S. C. 1 W. Black. 90, in 1757, Lord Keeper Henley decided the point, in a case that was not within the statute, a college of one of the universities. The question in substance was, whether Chancery would supply for such a case, a defect which the statute cured for a case that was within it; and his language is this, both in the report of Mr. Eden and of Sir William Blackstone. "I take the uniform rule of this court, before, at, and after the statute of Elizabeth to have been, that when the uses are charitable, and the person has himself full power to convey, *the court will aid a*

defective conveyance to uses. Thus, though devised to corporations were void under the Statute of Henry 8th, (The Statute of Wills,) yet they were always considered as good in equity, if given to charitable uses." It was supposed in *The Baptist Association v. Hart's Executors*, in 4 *Wheaton* 42, 3 *Peters* 492, that Lord Keeper Henley had been misreported; but these are his words in both reporters; and it will be found hereafter, that they are sustained by all that deserves the name of authority in England. Both reporters at the same time make the Lord Keeper speak of the conveyance as "being established *under the statute*;" but the case was not within the statute, and therefore the defect could not be supplied *by virtue of the statute*. The Lord Keeper necessarily meant to speak of the conveyance being established in like manner as in cases under the statute.

Lord Chief Justice Wilmot, in *Attorney-General v. Downing*, *Wilmot's notes* 24, in 1767, expresses the same sentiment with Lord Keeper Henley, in saying that "the king as *parens patriæ* has the superintending power over *all* charities, abstracted from the statute of Elizabeth, and antecedent to it; which paternal care and protection is *delegated to this court*." He speaks of the power, as a power of the Court of Chancery, and the rule, as a rule of the court, derived originally from the grant of the supreme power in the state, as all its jurisdiction is, but exercised by the Chancellor in *curia*, and not merely as representing the king personally in *camera*. The elaborate investigation by Lord Eldon in *Moggridge v. Thackwell*, 7 *Ves.* 36, proves that the jurisdiction over the subject of charities in all cases, belongs to the court judicially and originally; but that in one case, and one case only, that of a general indefinite charity without trustees, the charity is established, according to the personal direction of the king under his sign manual.

In recent times, circumstances have occurred to draw from the judges in England more pointed expressions on this head of Chancery Jurisdiction. In 1827, a case came by appeal from the Irish Chancery to the House of Lords, which brought up the question of the original jurisdiction of Chancery over charitable uses, independent of the statute of 43 *Elizabeth*. This statute does not extend to Ireland, and unless the general jurisdiction of Chancery had comprehended the subject of the appeal, it must probably have failed, if the case was to be regarded only as one of charity.

Lord Redesdale said, "We are referred to the statute of Elizabeth with respect to charitable uses, as creating a new law upon the subject of charitable uses. That statute only created a new jurisdiction; it created no new law; it created a new and ancillary jurisdiction, a jurisdiction created by a commission to be issued out of the Court of Chancery, to inquire whether the funds given for charitable purposes had or had not been

misapplied, and to see to their proper application; but the proceedings of that commission were made subject to appeal to the Lord Chancellor, and he might reverse or affirm what they had done, or make such order as he might think fit *for reserving the controlling jurisdiction of the Court of Chancery, as it existed before the passing of that act; and there can be no doubt, that by information by the Attorney-General the same thing might be done.*" *Attorney-General v. Mayor of Dublin*, 1 *Bligh* 347. "While proceedings under that statute were in common practice (as appears in that collection which is called Duke's Charitable Uses), you will find it stated, that in certain cases, although a commission might issue under the statute, an information by the Attorney-General was a better remedy. In process of time indeed it was found that the commission of Charitable Uses was not the best remedy, and that it was better to resort again to the proceedings by way of information in the name of the Attorney-General." *Ib.* "The right which the Attorney-General has to file an information, is a right of prerogative. The king as *parens patriæ* has a right by his proper officer to call upon the several courts of justice, according to the nature of their several jurisdictions, to see that right is done to his subjects, who are incompetent to act for themselves, as in the case of charities and other cases." *P.* 348.

Lord Eldon said he was most clearly of opinion, that "the jurisdiction of the Court of Chancery could not be taken away but by express words, or by words creating a necessary implication to that effect." *P.* 358.

The Lord Chancellor (Lyndhurst) said he was of opinion, "that the Court of Chancery had jurisdiction in the case, whether it was or was not a charitable use." *p.* 335.

All these great equity judges concurred consequently in holding to the original jurisdiction of Chancery in charitable uses.

Lord Redesdale repeats his opinion in the *Corporation of Ludlow v. Greenhouse*, also in the House of Lords, 1 *Bligh* 61.

And finally as late as 1833, Sir John Leach, in the *Attorney-General v. Brentwood School*, 1 *Mylne & K.* 376, in speaking of a devise to a corporation, in 1565, says, "I am of opinion, that although at this time no legal devise could be made to a corporation for a charitable use, yet lands so devised, were in equity bound by a trust for the charity, *which a court of equity would then execute.*"

Here is a mass of dicta and adjudications *since* the statute of 43 *Elizabeth*—the consentient opinion, judgment, and practice of lawyers and courts for two centuries and a quarter—affirming the full jurisdiction of the Court of Chancery over charitable uses *ab origine*; and against these we have only the solitary, unnecessary, ill considered dictum of Lord Loughborough, in the *Attorney-General v. Bowyer*, 3 *Ves. Jr.* 726. "It does not

appear," said his lordship, "that this court at that time (namely, before the statute 43d *Elizabeth*,) had cognizance upon informations for the establishment of charities. Prior to the time of Lord Ellesmere, *as far as tradition in times immediately following goes*, there were no such informations as this upon which I am now sitting, *but they made out the case as well as they could at law.*"

If this assertion were confined to proceedings by *information*, in the name of the Attorney-General, it would not concern us, in this case, nor perhaps in any other in this country; but the meaning of his lordship is distinct, that the tradition in times immediately following the statute, was, that in charitable uses they made out the case as well as they could at law, and had not the aid of Chancery. So it was understood, beyond doubt, by Chief Justice Marshall, and so it was applied in *The Baptist Association v. Hart's Executors*.

Lord Loughborough refers to no extant book or writing whatever, for this tradition, and yet he could have known nothing of tradition in times *immediately following the statute*, except by some printed or written work. It could not otherwise have come down to his lordship. I apprehend it to be as clearly demonstrable as a negative can be, that nothing of the kind existed. It would be expressly contrary to what was both adjudged and printed, had existed in print for more than a century, and was existing in his lordship's time, and still exists. Certainly Lord Loughborough was not required to be a legal antiquarian, acquainted with all ancient records then remaining in the archives of Chancery, and only since his day brought to light; but he was bound, before expressing his opinion on a question concerning the statute of Charitable Uses, and upon the jurisdiction of Chancery, to know something of the two fundamental works upon the subject, Duke's Charitable Uses, a book of acknowledged authority, and Sir Francis Moore's Readings on the Statute—the latter the work of an eminent lawyer, who drew the statute at the request of the House of Commons, who had delivered readings upon it to the students of the Middle Temple—and who was one of the most careful and accurate reporters of his day. Lord Loughborough undoubtedly had heard of both these works. He cites a case from Duke, in *Rumbold v. Rumbold*, 3 Ves. 69—two years before the *Attorney-General v. Bowyer*. Yet it will be seen most clearly, that if he had read either of them with care, he could not have said what is set down to him. The evidence of this will be found to be so strong, that it is but a proper respect to the Lord Chancellor, to suppose that he has been misreported, by nevertheless one of the most accurate of modern reporters.

I proceed now to cite several cases of decrees in Chancery, before the statute of 43 *Eliz.*, which incontestably show that

charitable uses were not left to make out their case as well as they could at law, but were assisted by Chancery, to the whole extent that they were ever assisted by commissioners under the statute.

The case of *Messenger v. The Mayor and Burgesses of Gloucester, Tothill*, 58, is a decree in the Judgment Roll of 36, 37 and 38 *Henry VIII*. The object of the bill does not appear; but the reporter says, "Forasmuch as upon the hearing of the matter, the defendant showed a tripartite feoffment of the premises, from John Cooke to the Mayor and Burgesses, *to the use of a free school* and other purposes, and because the plaintiff proved not the matter of his bill and replication, therefore the said manors and lands, &c., were decreed to the defendants and their successors to their uses, and that the plaintiff should, by Christmas next, deliver them all the evidences concerning the same."

In *Carey*, 103, *Parrott v. Pawlet*, 20 *Eliz.*, the bill being for the benefit of the poor of Drayton, was retained, though under forty shillings.

In *Elmer v. Scot*, 24 *Eliz.*, *Choice Cases in Chancery*, 155—there is another case of a decree in Chancery in a charitable use, for which there could have been no remedy at law.

Sir Francis Moore in his reading, gives the case of a decree in Chancery in the same year, 24 *Eliz.*, in the following terms. "One Symons, an Alderman of Winchester, sold certain land to Sir Thomas Fleming, now Lord Chief Justice, then Recorder of that town, and this was upon confidence to perform *a charitable use*, which the said Symons declared by his last will, that Sir Thomas Fleming should perform. The bargain was never enrolled; and yet the Lord Chancellor decreed that the heir should sell the land, to be disposed according to the limitation of the use. And this decree was made the 24th of *Queen Elizabeth*, before the statute of *Charitable Uses*, and this decree was made upon ordinary and judicial equity in Chancery; and therefore it seems the commissioners upon this statute, may decree as much in like case." *Duke*, (by Bridgeman) 163.

This is express to the whole matter involved in the point; and Sir Francis Moore cites the case, not to prove that Chancery could make such a decree in such a case, nor that it could be made upon *ordinary and judicial equity*, but for the reason, that because it could be made, and by virtue of this ordinary jurisdiction, therefore commissioners under the statute might do the same. He infers the power of the commissioners in like case, from that of the court, and not the power of the court from that of the commissioners.

On the same page, *Duke*, 163, is another case. "Sir Thomas Bromley decreed, and compelled the terretenant to give seisin of a rent seck, to the intent the party might bring an assize." Sir Thomas Bromley was created Lord Chancellor in 1579, 21

Eliz., and died in 1587, 29 *Eliz.* If the court had not decreed seizin to be given to the landlord, he would have had no remedy whatever at law. *Co. Litt. Sec. 217, 233, 341. Co. Litt. 159, b. 315. (a.)*

The cases of *Elmly Lovett*, and *Bratlington Sussex*, before 37 *Eliz.*, *Duke*, 360, 361; *Howard's case*, 40 *Eliz.*, *Duke*, 136; *Throgmorton & Gray's case*, 41 *Eliz.*, *Duke*, 131; *Kenson's case*, 41 *Eliz.*, *Duke*, 361; *Buggs v. Sumpner*, 8 June, 43 *Eliz.*, which was before the statute, *Tothill*, 120; *Mayor of Reading v. Lane*, 43 *Eliz.*, (perhaps on the dividing line,) *Duke*, 361, were all decrees in Chancery, in cases of charitable use, before the statute.

The case of *Attorney-General v. Master of Brentwood School*, 1 *Mylne & K.* 376, gives the particulars of a decree in Chancery in 1570, 13 *Eliz.*, showing the exercise of jurisdiction by Chancery, establishing a charitable use under a devise to a corporation, absolutely void at law, the heir being decreed to convey to the corporation, and conveying accordingly in 1573. It was this decree that Sir John Leach was called upon to carry into effect, and did carry into effect in 1833, in remedy of an abuse of the charity of long standing.

These cases would be sufficient to refute Lord Loughborough, if they stood alone; for we might show their intrinsic propriety and necessity, as acts of equity jurisdiction, by asking the question, how it is possible to suppose, that such a jurisdiction did not exist before the statute 43 *Eliz.*, considering what the statute says and is?

It is the creation of a *new remedy* by commissioners, with appeal to the Lord Chancellor, or Lord Keeper, or Chancellor of the Duchy of Lancaster, with power to annul, diminish, alter, or enlarge the decrees of the commissioners, as "to either of them in their jurisdictions, shall be thought to stand with equity and good conscience." The general jurisdiction of Chancery is therefore referred to as an existing power, by which to administer equity upon appeals in cases of charitable use.

It is a remedy in *certain cases* only, expressly excepting many and perhaps all the most important by name. But the excepted cases were of a class to bear the delay and the expenses of Chancery, and to require the more solemn methods of investigation used in that court, instead of jury trial and oral proof, which the commissioners were to use. Was there no existing jurisdiction to protect charitable uses to the Colleges of the two Universities—the Colleges of Westminster, Eton, and Winchester—to Cathedral or Collegiate Churches—to cities and towns corporate—to hospitals or free schools which have special visitors appointed by their founders? For all these are excepted from the jurisdiction of the commissioners.

It takes away no existing jurisdiction of any kind. It expressly saves the jurisdiction of the ordinary, which extended to many

matters in the act; and it says nothing to abridge the power of Chancery, which of course remained afterwards as it was before, and was expected to remain for the protection and correction of what would have otherwise been destroyed by the exceptions in the statute.

But all these questions and inquiries are superfluous, except to show the inaccuracy of Lord Loughborough's *dictum*. Since his time, and since the decision in the *Baptist Association case*, the fact of the regular, constant exercise of original jurisdiction in cases of charitable use, by Chancery, before the 43 *Eliz.*, and from a point of time a century before the first year of that queen, has been placed beyond all doubt.

The British House of Commons in the year 1800, presented an address to the king, praying him to give such directions as he should think fit, for the better preservation, arrangement, and more convenient use of the public records of England; and in consequence of this address, and by virtue of commissions from George III. and his successors, many volumes have been printed by direction of the Record Commission, and among others, the calendars or indexes of the proceedings in Chancery, in the Tower of London.

From three of these volumes, printed in 1827, entitled, "Calendars of the Proceedings in Chancery, in the reign of Queen Elizabeth, to which are prefixed examples of earlier proceedings in that court, namely, from the reign of Richard the Second, to that of Queen Elizabeth, inclusive, from the originals in the Tower,"—I have selected about fifty cases of bills, answers, &c., in charitable uses, of every variety, and asking for every species of relief, two of them from the reign of Henry the Sixth, which ended in 1460—one from the reign of Edward the Fourth, his successor—and the rest from the reign of Queen Elizabeth. The extant records in these reigns are by no means perfect, and those of the earlier reigns are very defective. The years of the reign do not always appear. In some they are stated, and in others they can be ascertained by collateral proofs. The decrees are not given, though in a few cases they also may be ascertained collaterally. The calendars give in every case, the names of the complainants or relators, and defendants, and the object of the bill. They are, in fine, indexes for reference, to such as wish to examine the original records. In the cases from *Henry VI.* and *Edward IV.*, the bills and answers are set out in the printed volumes at length, as specimens of the Chancery practice of that day.

Babington v. Gull, 1 vol. p. lvi, is a bill addressed in the reign of Henry VI. to the Bishop of Winchester, Chancellor of England, complaining that the plaintiff's mother had placed 600 marks in the hands of the defendant, for the purpose of founding a chantry in the Church of St. Peter, of Haworth, in Notting-

hamshire, which he had neglected to do. The answer admits the receipt of the money for the purpose mentioned, but adds, that if the chantry was not endowed within four years, which were not expired, the money was to be applied to finding three priests, to sing daily in the said church, and that he is willing to pay the money according to the direction of the court. This bill must have been in the 37th year of *Henry VI.*, or before, as by a note of the sub-commissioner, Babington's chantry was perfected in that year of the reign, which was in 1458, one hundred years before the first of Queen Elizabeth.

Wakering v. Bayle, is another bill addressed to the same Chancellor, in the same reign, to compel the defendant to make an estate of certain lands, to the Hospital of St. Bartholomew, in West Smithfield, to the intent to find a priest perpetually "to sing and to office in a chapel, all of new, made by the cost," of one of the feoffees; vol. 1, p. lvii. This was before the 38 *Hen. VI.*—for in that year the Bishop of Exeter was made Chancellor, and continued to the end of the reign.

The same plaintiff, Wakering, filed another bill against Bayle, for the same cause in the reign of Edward IV., stating the former bill, under which he says the defendant was examined and sworn "before Harry, late of dede and not of right, Kyng of Ingland, in his Chauncerie;" and asking that the defendant might be compelled to make the estate, and to stay waste in the mean time. Vol. i. p. lxii.

Lyon & Wife v. Hewe & Kemp, vol. 2, p. xlv. is a bill addressed to the Archbishop of York, Chancellor of England, being the same Bishop of Exeter, who was made Archbishop in 5 *Edw. IV.*, complaining that the defendants had disposed of property left for religious and charitable purposes, contrary to the will of the plaintiff Ellen's late husband.

The calendars of Elizabeth's reign, I will refer to by volume and page, giving the object of the suits only in such cases as appear to be material, and as will exhibit the various kinds of relief that was asked.

"*Brentwood—Parker* and two others, in behalf of themselves, and other the inhabitants of the town of, against *Browne*. Bill to establish donations. A chapel of ease to the Parish Church of Southwelde, in which parish the town of Brentwood is situated, and a free school and alms-houses there." vol. 1, p. 81. This is the same case that is stated in the *Attorney-General v. Master of Brentwood School*, 1 *Mylne & K.*, 376, in which it appears, that the bill was filed in 12 *Eliz.*, and a decree made 3d May, 1570, establishing a devise for charitable uses to a corporation, and ordering the heir of the testator to convey.

"*Buggs the elder*, and two other complainants, against *Sompney* and three other defendants. Bill to establish Charitable Uses—a tenement called the Old Pole, and lands thereto belong-

ing, in Harlow, conveyed and settled temp. *Hen. 8.* by John Swerder to feoffees in trust for the poor of the said Parish of Harlow." vol. 1, p. 96.

"*Buttlett and Purchas* (churchwardens) against *Fitch*. Bill for performance of charitable institutions—land called Church Pig-little, held from time immemorial, for repairing the parish church of Lyndsell." vol. 1, p. 98. No trustees, and complainants not a corporation to hold lands.

"*Blenkinsopp and Salkeld* against *Awndersonne* and two others. Bill to establish a charitable donation—an annuity of £8 for certain paupers and a schoolmaster in the Parish of Burch, under Stainsmore, devised by Sir Cuthbert Buckle, Knight, late Lord Mayor of London, to be charged on his mesuage, called the Spittle on Stainsmore, and lands thereto belonging." vol. 1, p. 101. No trustees.

"*Bocking Parish—Fytche and Goodwin*, churchwardens, and *Wyndall* and others, overseers of, against *Robinson* and two others. Bill to recover a legacy to charitable uses—the sum of £400 bequeathed by Joan Smyth, widow, to be invested for producing a yearly fund for the relief of the poor of Bocking." vol. 1, p. 134. No trustees.

"*Barrington Parish—Tychner and College*, churchwardens of, against *Lancaster*. Bill for injunction in support of a charity." vol. 1, p. 141.

"*Carlton*, on behalf of himself and others, inhabitants of Elm, against *Blythe* and two others. Bill to recover charitable donation—a legacy of £13 13s. 4d., bequeathed by the will of John Allen, deceased, to be invested at interest for the benefit of the poor of the Parish of Elm." vol. 1, p. 159. No trustees.

"*Cornworthy Parish—Perott* and others, inhabitants and parishioners of, against *Cruse*. Bill to appoint new trustees for a charity." vol. 1, p. 159.

"*Congressburg Manor—John Irish* and others, tenants of, against *Aishe* and others. Bill for performance of will for charitable uses—the manor and lordship of Congressbury and lands, devised by the will of John Can to the defendants upon sundry trusts." vol. 1, p. 213.

"*Chester—Mayor and Citizens of*, against *Brooke and Offley*. Bill to establish a charity—legacies left by the will of Robert Offley, of London, Haberdasher, for the benefit of apprentices and other inhabitants of the city of Chester." vol. 1, p. 216. No trustees.

"*Christ Church within Newgate—Vicar and Churchwardens of*, against *Vicar and Churchwardens of the Parish of All-saints, Barking*. Claim of donation to charitable donations—a legacy of £4 per annum, bequeathed by the will of Joan Watson, and claimed by both these parishes." vol. 1, p. 218. No trustees, and apparently an indefinite charity.

"*Dartmouth—Mayor, Bailiffs, and Burgesses of*, against *Ball*. Bill for appointing new trustees for charitable uses." vol. 1, p. 225.

"*Danburye, Parish and Town—the Churchwardens, Parishioners, and Inhabitants of*, against *Emerye* and five others. Bill to regulate charitable donations of land—lands in Purleigh, purchased by certain well-disposed and charitable persons in trust for the poor of Danburye." vol. 1, p. 241.

"*Dartmouth Hardness—Mayor, Bailiffs, and Burgesses of Clifton*, against *Furnman* and another. Bill for performance of charitable trusts—lands in Clifton, Dartmouth Hardness, &c., conveyed by William James to feoffees in trust for the poor of Dartmouth, and other charitable purposes." vol. 1, p. 257.

"*Elksley—Blacknall and others on behalf of the inhabitants of*, against *Sproy* and others. Bill to establish a charitable donation, a parcel of ground in the Parish of Elksley, containing 500 acres, which was of ancient time given and conveyed to certain feoffees in trust for said parish." vol. 1, p. 276. Trustees unknown.

"*Elm—Carleton for himself and the rest of the inhabitants of the Parish of*, against *Blyth* and others. Bill for charitable purposes." vol. 1, p. 282. This is the same case indexed under the name of Carlton.

"*Fairford—Jenkins and others, tenants and inhabitants of the Manor and Parish of*, against *Oldisworth*. Bill to establish rights of copyholders, and charitable donation—the Manor of Fairford." vol. 1, p. 291. No trustees, and trust apparently indefinite.

"*Feversham—Mayor, Jurats, and Commonalty of*, against *Joan Lady Hannots*, late the wife of *Henry Hacker*, and others. Bill to establish a devise to a corporation, a messuage, &c., in Feversham, and all other his lands in the Isle of Hartye, &c.; all which, after the decease of his said wife, he devised to the said mayor, jurats, and commonalty in fee for the benefit of the said corporation, repairing the harbour and highways thereof." vol. 1, p. 308. This is probably the case of the same plaintiffs against *Dominam Amcoats, Tothill*, 138, in 11 and 12 *Eliz*.

"*Gillingham—Estmond and other inhabitants of the town of*, against *Lawrence*. Bill of revivor to establish certain charitable uses—divers messuages, lands and tenements, parcel of the copyhold of the queen's manor of Gillingham, which the bill states to have been held time immemorial, for the support of a charity school and other charitable purposes in Gillingham." vol. 1, p. 376. No trustees, and the trust in part indefinite.

"*Goodson and others against Munday and others*. Bill for performance of a trust for charitable uses—divers messuages and lands in Ailesbury and Hartwell, sometime the estate of John Bedford, who by a feoffment dated 10th July, 1494, conveyed the same to certain feoffees in trust among other things for the

repair of the highways about Ailesbury and Hartwell." vol. 1, p. 378. Trustees unknown.

"*Havenyngham*—*Sir Arthur Havenyngham, Knt.* and other inhabitants of, against *Tye and several others*. Bill to obtain attornment and rent for charitable purposes, fifty acres of land, meadow and pasture, called the town land of Havenyngham, lying in Badyngham, in the occupation of defendant Tye, the reversion in feoffees for the use of the said town." vol. 1, p. 395. See *Duke*, 163, where Sir Francis Moore says, "it is said there are precedents in Chancery, where the Lord Chancellor had decreed and compelled the tenant to attorn, where the reversion is granted to a charitable use."

"*Halingsbury Morley*—*Sayer and Pryor*, Overseers of the Poor of, against *Lambe and another*. Bill to establish a charitable donation—a sum of £20, given by the will of Thomas Lambe, deceased, to be for the perpetual benefit of the poor of Hallingsbury parish, and which the bill prays may be laid out in the purchase of land for that purpose." vol. 1, p. 399. No trustees.

"*Huckmore* against *Lange and another*. Bill to recover title deeds for charitable uses. vol. 2, p. 5.

"*Harlow*—*Buggs, and others, inhabitants of the Parish of*, against *Sibley*. Bill for establishing a charitable donation, a copyhold, tenement, garden and land, held of the manor of Harlowbury, which was given and surrendered by one John Godralf, to the use of the poor of said parish." vol. 2, p. 49. A defective surrender at law.

"*Heron and Brown, Executors of Freston* against *Sproxton* and two others. Bill for performance of a will respecting charitable donations—divers messuages, lands and tenements, &c., late the estate of the said John Freston, who by his will gave large sums of money for building and endowing an almshouse in Kirkthorpe, and a free school in Normanton, repairing highways, and other purposes." vol. 2, p. 72.

"*Irchester*—*Fisher for himself and others, the inhabitants of the town of*, against *Bletsoo*. Bill in support of a charitable donation—divers messuages, lands and tenements in Irchester and Willingborough, which in the time of King Henry VII. were given and granted by William Taylor and John Sely, to trustees, for the use of the poor of Irchester, and repair of the bridges there." vol. 2, p. 107. Trustees unknown.

"*Icklingham*—*Stock and others, on behalf of the poor of*, against *Page and others*. Bill for performance of a charity—a capital messuage, &c., in Icklingham, settled from ancient time in feoffees for the use of the poor of the said town." vol. 2, p. 107. Trustees unknown.

"*Ilford*—*Fisher, Master of the Hospital of St. Mary of*, against *Anne Seward*, widow. Bill of revivor to recover dues of charity—the tithes of the demesne lands of the farm of Eastbury, &c.,

settled for the relief of poor persons in the hospital of Ilford." vol. 2, p. 108.

"*Kibworth—Brian, and others, inhabitants of the parish of, against Benk and others.* Bill for performance of a charity—divers messuages and lands in Kibworth, given at different times, for the use of the poor inhabitants of said parish." vol. 2, p. 119. No trustees.

"*Kybworth—Foze for himself and others inhabitants of the parish of, against Bente and others.* Bill for the support of a charity—nine messuages and cottages, &c., given for the support of a schoolmaster and grammar school at Kybworth." vol. 2, p. 128. No trustees.

"*Litchfield—Babington Master or Warden of St. John Baptist in the City of, against Lale and two others.* A capital messuage and divers other houses, and 100 acres of land, in Litchfield, &c., held for the support of poor persons in the said hospital, and also of a free grammar school." vol. 2, p. 139.

"*Lynn—the Mayor and Burgesses of the town of Kings, against Thomas Howes, Clerk.* Bill for performance of a charitable donation—John Titley, Esq., by his will, gave a payment charged upon his dwelling-house at Lynn, for the maintenance of a preacher there, and other charitable purposes." vol. 2, p. 146. No trustees, and trust partly indefinite.

"*Northampton—the Mayor and Chamberlains of, against Neale and another.* Bill to support a charitable donation, two messuages in Northampton, late the inheritance of Henry Neale, deceased, and by him charged with certain charitable payments." vol. 2, p. 271. No trustees.

"*Peworth and others against ———.* Bill to support a charitable donation, lands, &c., the inheritance of Richard Porter, deceased, who conveyed the same to plaintiff's father and others, as feoffees in trust for the repair of the parish church of Mickleworth." vol. 2, p. 303.

"*Rodborough—Rycardes and others, for themselves and the rest of the inhabitants of, against Payne and others.* Bill to protect a charitable donation—certain lands, &c., which in the time of King Henry VI., were given by Margery Breyseyn, and others, to the churchwardens and inhabitants of Rodborough, for the performance of divine service in a chapel of ease to said parish, but which defendants claim as having been forfeited to the Crown, being given for superstitious uses." vol. 2, p. 430. No trustees capable of taking.

"*Sand and others, against Seare*—claim under a deed of rent charge, for charitable purposes." vol. 3, p. 67. Indefinite charity.

"*Smith and Wells, Churchwardens of St. Aldate's, Oxford, on behalf of the parish, against Smith and another, feoffees.* Bill against defendants, as feoffees in trust, to perform, and carry

into effect such charitable uses. Edgecombe, being seized of certain houses, lands, &c., in the City of Oxford, conveyed the same to certain feoffees, in trust, who from the profits thereof, were to repair the church, to relieve the poor, and for other good and charitable purposes: they conveyed the same to new feoffees, of whom the defendants are survivors, and refuse to account." vol. 3, p. 108.

"*Thorplangton—the inhabitants of, against Jarvyes, only surviving feoffee*, to compel performance of trusts, in a deed of feoffment for charitable uses, and to convey to other feoffees." vol. 3, p. 169. Indefinite charity.

"*Turner and another, against Buckmasters*. Bill to protect the plaintiffs, in execution of the will of Thomas Knighton, for charitable uses. Lands lying within, and parcel of the manor of Leighton Bussard. The defendants allege the same to have been left to superstitious uses, and endeavoured to get the same into their own hands." vol. 3, p. 183.

"*Urswick Grammar School, Andrews, and four others, against Blunt and wife*. Bill to enforce a claim, under the will of William Marshall—a moiety of the Manor of Beauntingthorp, devised for the endowment of a grammar school, in the town of Urswick, and of such will appointed C. Marshall, executor, who died: and the defendant, Anne, his widow, afterwards married the defendant, Blunt, who entered into the whole of the manor, and refuses to comply with the provisions of the said will." vol. 3, p. 197.

"*Warwick—Master and Brethren of Hospital of Robert, Earl of Leicester, in, against Lee and another*. For payment of an annuity given to a charity." vol. 3, p. 249.

"*Witham—Hall and Hill, on behalf of themselves, and other the freeholders and inhabitants of, against Panke*. Bill for the support and continuance of a charity. By the gift and grant of well-disposed persons, divers lands in Witham, and divers sums of money, were given for the reparation of the church, the relief of the poor, and other charitable purposes, which lands were settled in feoffees; and the defendant, having gotten possession thereof, and moneys, and the deeds of settlement, refuses to perform said trusts, or to appoint new feoffees in the names of those dead." vol. 3, p. 252. This Bill was in 39 *Eliz*.

"*Writtle—John Lloyd, vicar, Th. Baker and Rd. Wilton, Churchwardens and poor of, against Aware and others, surviving feoffees in trust for the said parish*. Bill for the continuance of a charity—a messuage and land given by Thomas, in the year 1500, to feoffees in trust, for the poor of the said parish." vol. 3, p. 269. This bill was in 38 *Eliz*.

"*Wyllet and Sudbury, Churchwardens and inhabitants of the town of Middleton, against Middleton, widow*. Bill to recover a

charitable pension—a yearly rent of 6s. 8d., payable to the parish of Middleton, charged on a messuage and land in Middleton.” vol. 3, p. 286.

“*Whitehurst and others against Warner*. Bill for support of a charity.” vol. 3, p. 291. Filed 15 *Eliz*.

“*Warner against Whitehurst and others*. Cross bill, setting forth the bill and decree in the former case, and an award between the parties, and for carrying the award into execution.” vol. 3, p. 292. Filed 20 *Eliz*.

“*Wellborough—Rawley, and others, inhabitants of the parish of, against Lewis and others*. Bill to appoint new trustees of a charity.” vol. 3, p. 319. This bill was addressed to Sir Nicholas Bacon, who was made Lord Keeper in 1 *Eliz.*, and died in 21 *Eliz*.

Here is a mass of testimony on the fact of Chancery jurisdiction, in cases of charitable uses, before the 43*d* of *Elizabeth*, that cannot be resisted. When we advert to the various objects of these bills, we may imagine ourselves to be reading a Chancery calendar of the present day, in which, parties in some cases with no definite or particular interest legal or equitable, ask for the supply of new trustees, for the redress of abuses, for a decree to enforce a charge upon land, or to change the investment of a charity—in behalf of the poor—of schools—of churches—of hospitals—without regard to the statute of Wills, or the statute of Enrolment, or to any other mere legal impediment—injunction bills—bills of revivor—cross bills—the full action of equity in all respects. Charitable uses were, therefore, not left to be made out at law as well as they could be. Chancery assisted them precisely as it now does.

I am entitled, therefore, to suppose that my fourth point has been proved demonstratively, by evidence not to be opposed or doubted.

V. *The statute 43 Eliz., is only an ancillary remedy, as Lord Redesdale avers, adopted originally for expected facility and economy, and to avoid the delay and expense of the old remedy by Chancery, to which the statute has yielded, and gone itself into oblivion, because it proved more dilatory, more expensive, and more uncertain.*

This is already made apparent under the previous point; but there is, or has been, in some courts of our country, an adhesion to this statute, altogether extraordinary, and it is useful to multiply the proofs, that it created a special jurisdiction and did nothing more. In creating that jurisdiction, it used language in its recitals, which was derived from the settled practice and doctrine of equity in regard to limitations and appointments to uses; and this derivation being lost sight of, the statute has by

some persons been regarded as the parent of charitable uses, instead of being their minister only. The proofs of its being a subordinate remedy only, are obvious on its face.

1. There is no enactment or declaration in the statute to make any use good that was not so before. It supposes the gifts to have been and to be in their nature good, and provides redress for the abuse and mismanagement of them.

2. The statute is said in some cases to be *retrospective*. If this means that it operates to take from heirs at law and next of kin, what was their full property before the statute, and to give it to others, it is without example in the history of English legislation. Since a much earlier day than the statute, the English constitution has been as well settled in regard to private rights, as it is now, and to the same effect. An Act of Parliament is never made retrospective to divest private rights of property, though often with great benefit to extend a remedy to cases which before had none. The statute of 43 *Eliz.* was retrospective in remedy—because the rights which previously existed, were thought to require a quicker, cheaper and more inquisitorial remedy than the old one—but it was retrospective in remedy only. Had charitable uses been bad before the statute, there would have been enactments to make them good thereafter, and not merely recitals that they had been given, and had been defrauded, abused, or neglected. The statute proceeds upon the ground, that charitable uses always were the property of the objects of them, the poor, the sick and the like; and that heirs, and next of kin, and all other persons, had no substantial property whatever in them.

3. The Lord Chancellor and Lord Keeper, being fully authorized on appeal from the commissioners, to annul, diminish, alter or enlarge the judgments and orders of the commissioners, as to either of them should be *thought to stand with equity and good conscience*, it was intended consequently, that the *same equity* should be the rule before the commissioners. It is manifestly inconsistent with the intention of the statute, to give the commissioners any power, except to administer an existing equity; and it is the same equity that is to be the corrective of all their errors.

4. The statute became obsolete through the defectiveness of the remedy, and not by usurpation of its powers. Every appeal was necessarily a bill in Chancery, and the previous jury trial, and oral testimony of witnesses, were lost time and expense. The exceptant on appeal was complainant, and the opposite party respondent. The exceptions were a bill, and the denial of them an answer. 3 *Bl. Comm.* 428; *Burford v. Leather*, 2 *Atk.* 550. Lord Redesdale says, the proceeding before the commissioners was puzzling, inconvenient and unjust. In the last hundred years there have been but six cases, the last in 1808. 15 *Ves.* 305, 8 *East.* 221, *Kirkby Ravensworth Hospital*. The great

use of the statute was in redressing those flagrant robberies of charitable uses, which occurred during the struggles of the Reformation, and of the Rebellion, and of the Commonwealth that followed, cases for the most part too gross for appeal. There were forty-five commissions the first year after the statute was passed, and from 1643 to 1700, eight hundred and thirty-six. *Shelford*, 278, note (i.)

5. The commissioners did nothing under the statute, that was not done in Chancery before. It is said to have repealed certain statutes; for instance—*First*, the statute of Enrolment, 27 *Henry VIII.* c. 16; *Jenner v. Harper*, *Gilb. Eq. Rep.* 44. So did Chancery before the statute. *Symon's case*, *Duke*, 163. The enrolment acts have always been held not to affect the fundamental principles of equity. *Shandos v. Brownlow*, 2 *Ridgw. P. C.* 428; *Shep. Touch.* 224, ch. 10.—*Secondly*, the Statute of Wills, by sustaining devises for charitable uses to Corporations. *Duke*, 363, *Jesus College case*; *Duke*, 375, *Hillam's case*; *Duke*, 377, *Mayor of Bristol v. Whitton*. So did Chancery before the statute. *Attorney-General v. Master of Brentwood School*, 1 *Mylne & K.* 276. A will was a good appointment in equity before the statute. *Attorney-General v. Bowyer*, 3 *Ves.* 727.—*Thirdly*, the statutes of Mortmain, it has been said, were repealed by the statute. *Hobart*, 136, *Griffith Flood's case*; *ib.* *Collinson's case*. Chancery before had held them to be no obstacle to the holding of a charitable use by a Corporation. *Attorney-General v. Master of Brentwood School*, 1 *Mylne & K.* 376. The decree in 12 *Eliz.* was in point, both to the statute of Wills, and statutes of Mortmain. *Duke*, 133, *Sir Francis Moore's reading*.—*Fourthly*, the commissioners, under the statute, it is also said, supplied the surrender of a copyhold. *Moore*, 89, *Revel's case*. So did Chancery before. *Fairford v. Oldisworth*, 1 *Proceedings in Chancery*, 291; *Buggs v. Sibley*, 2 vol. p. 49; *Guiddy's case*, *Duke*, 135. Surrenders are universally supplied in Chancery, for any thing that has the least claim upon the court—for a widow, 16 *Ves.* 90, younger children, 16 *Ves.* 268, creditors, 12 *Ves.* 216, for any devisee or legatee, if the heir is not wholly without provision. 1 *Ath.* 389.—*Fifthly*, the commissioners, it is further alleged, supplied defects in conveyances, where the grantor was competent. *Duke*, 370, *Christ Hospital v. Hawes*. In Chancery it was never otherwise, when there was either trust or consideration.—*Lastly*, the commissioners disregarded misnomer. So Chancery has always done, and the courts of law also, unless the party has made the name material in pleading, or the name is so far wrong as not to be *idem sensu et re.* 6 *Taunt.* 467, *Croyden Hospital v. Farley*; *Duke*, 83, *Mayor of London's case*; 10 *Co.* 122 b., *Case of King's Lynn*.

In fine, the cases, instead of showing that Chancery before the statute had not full power over charities of all kinds, only show

that in certain cases, the commissioners were entitled by the implication of the statute to exercise the same power as Chancery had always done.

Certainly, however, before the Charter of Pennsylvania, in 1682, the rule of equity, as to such uses, became and was the same in all cases in equity, as in certain cases it was under the statute, and was one code of Chancery law; and as such it existed for the use of the Colony of Pennsylvania, and was adopted by that colony, as fully as the common law, as I proceed to show in the next place.

VI. Whatever the 43d of Elizabeth imparted to the Law of Charities, be it more or be it less, except the mere remedy by commission from the Lord Chancellor, or Lord Keeper, has been thoroughly adopted in Pennsylvania from her earliest day, together with the great body of the equity code of England.

The whole doctrine of charity as adopted in England, except perhaps the doctrine of *cy-pres*, which was made odious rather by its subserviency to religious intolerance, than by any intrinsic defect, is the law of Pennsylvania, established in all the ways in which law can be established among a people.

I need not say that the law of Pennsylvania must govern the present case, if we can find out what it is. At least one case in every volume of the reports of this court, sanctions the position that the settled law of the State, is the rule of decision in this court. I may refer to 1 *Wheat*, 279, *Mutual Assurance v. Watts*; 2 *Wheat*. 316, *Sharp v. Miller's heirs*; 6 *Wheat*. 119, *Fletcher v. Powel*; 7 *Wheat*. 550, *Blight's lessee v. Rochester*; 8 *Wheat*. 535, *Daly v. James*; 10 *Wheat*. 152, *Elmendorf v. Taylor*; 12 *Wheat*. 153, *Jackson v. Chew*; 5 *Peters*, 151, *Henderson v. Griffin*.

The complainants must show affirmatively, that the law of Pennsylvania does not conform to the law and the equity that existed in England at the date of the charter, and which must be taken to be the law and the equity of Pennsylvania, until the contrary is shown.

Their course is the strongest presumption possible against them and their case by the law of Pennsylvania. They have fled from this law to the Federal courts, in hopes of escaping to a different law. They raised no question against the charity until five years after the testator's death; but received their legacies under the will, and recovered in ejectment the after purchased estates, as persons having no other claim. They saw the city entering into possession, performing the trust, and as they say in the amended bill, *misappropriating* immense sums of money, without giving them a caution. They saw the executors file their accounts from time to time, claiming credits for payments to the city of more than three millions of dollars

within fifteen months after the testator's death—and gave no caution to the executors. It is impossible to reconcile this conduct with integrity, except upon the supposition that the counsel, whom they employed in the suits for the after purchased estates, had advised them, that under the law of Pennsylvania, they had no claim to any thing more. It is not admitted that they could have obtained any other advice from professional gentlemen acquainted with the law of Pennsylvania. They have come here in the hope of overthrowing that law, not relying certainly upon any thing that in a like case in all respects this court has decided, but relying upon a course of reasoning by the venerable chief justice in the *Baptist Association case*, which if carried out, as it was in Maryland and Virginia, they hoped might comprehend this case. All this certainly affords ground of presumption that the law of Pennsylvania, as her courts administer it, is fatal to their claim; and this presumption which it is their duty to remove, it will be mine to fortify, and to raise to full proof.

The principle of public charities for religious, literary, and humane purposes, is too deeply seated in the hearts of the people of that State, in their adjudications, their laws, and their constitution, ever to be eradicated. They are written on all these tablets in characters not to be mistaken. An earthquake would alarm and convulse them less, than an authoritative judicial decision, overthrowing charitable uses, as the courts of Maryland and Virginia have overthrown them.

Until the decision in the *Baptist Association case*, in 1819, these uses it is believed had been practically respected in all the States. No adverse decision had ever been pronounced against them. In one or two instances in Pennsylvania, they had received confirmation from judicial proceedings. Two cases had occurred in the Supreme Court of Massachusetts, and had been sustained by an elaborate judgment of that learned court, after argument by counsel, but without coming it would seem to the notice of this court. *Bartlett v. King, ex'or*, 12 Mass. 537, in the year 1815. *Trustees of Phillips' Academy v. King, ex'or*, 12 Mass. 553, in the same year. In general, however, they had not come before the courts, because they were not doubted; and it may be said with great confidence for Pennsylvania, that fifty years ago there were many professional men and others then living, who would have said that the first Constitution of the State settled their validity, as firmly and as expressly as it settled the rights of conscience.

From the date of 1819, however, the case has been otherwise. Charitable Uses have been brought into judgment in most of the States; and although Maryland in the same year, and in 1822 and 1823, followed out the reasoning in the *Baptist Association case*, and went perhaps beyond it, as Virginia has since done in

1832, overthrowing them almost from the foundation, yet in ten or more of the States, including Pennsylvania, they have been sustained with the most harmonious consent of reasoning, as well as of conclusion.

There is no one of the colonies to whom they were more indispensable than Pennsylvania. The people who first settled that colony, were a religious and charitable people, who fled from the intolerance of parliamentary law in England, to obtain security for their religious worship, and the education and instruction of their youth, embracing always their poor youth in all their thoughts, without resorting to legal enactments for their protection. Knowing how much such enactments had been abused elsewhere, the people called Quakers, never cared to resort to them here. They never did resort to them, though in self-defence the main body of Protestant dissenters, to call them by their English title, felt compelled to do so. The Quakers never asked, and never received grants of corporate powers for any of their meetings, schools, or almshouses. They were never willing to receive such aid. Their churches, burial grounds, almshouses, and schools, which showed themselves every where as soon as the trees of the forest were cut away, and were as dear to them as their personal liberty, and more so, had no protection from legal enactment, nor from incorporation, by the Proprietaries. They had the protection of the English Law of Charitable Uses, or if they had not this, they had none.

The Assembly of Pennsylvania rarely or never exercised the power of granting acts of incorporation to any body of men, until after the Revolution, or rather until the Revolution was at hand. Charters of incorporation were granted by the Proprietaries only, with perhaps a single exception, that of a school for all denominations in Philadelphia, which was chartered by the Assembly soon after the first arrival of the colonists. The Proprietaries did not exercise this power for churches or schools, until the year 1765, when the approach of the crisis which was to involve the proprietary estates, disposed this family to make friends among the sober and substantial men in the community, by giving their religious and charitable institutions this protection.

How is it possible to suppose, that this people for nearly a century, had held their real and personal estates devoted to charity, whether religious or secular, without any security at all? Or what security can it be thought they looked to, except that which they had brought with them in the common law, and in the English system of equity? For the most part they held these estates by individual trustees. But what were these, if the trust was void? And it was universally void, if the uncertainty to which the complainants object, could make it so. If the trust was not valid, the trustees themselves might have plundered the

charity with impunity. In the infancy of the colony, and at a time when religious intolerance was endeavouring to erect its standard in Pennsylvania, there was not wanting a case, in which the invalidity of a religious charity was made or alleged to be the pretext for such a spoliation. But with this exception of religious disability, which I am to speak to hereafter, there was never a moment after the first arrival of the Colonists, when charities of all kinds were not as safe in Pennsylvania, by the common law and equity of that State, as they ever were, or are now in England.

The derivation of the law of England generally, to the Colony of Pennsylvania, is clear, immediate, and direct; and it includes the whole body of that law.

The Charter declares—"that the laws for regulating and governing property within the said Province, as well for the descent and *enjoyment* of lands, as likewise for the *enjoyment* and succession of goods and chattels, and likewise as to felonies, shall be and continue the same, as they shall be for the time being, by the general course of the law in our kingdom of England, until the said laws shall be altered by the said William Penn, his heirs or assigns, and by the freemen of the said Province, their delegates or deputies, or the greater part of them." *Section VI., Weiss & B. 2.*

Previous sections of the Charter, which give power to the Proprietary and his heirs, and his and their deputies and lieutenants, by and with the advice and assent of the Freemen of the Province, or of their deputies or delegates, to make, enact, and publish, any laws whatsoever, manifest the clear purpose of the Crown to continue the great body of the law of England in force within the Colony, by providing, "that the same laws be consonant to reason, and not repugnant or contrary, but (as near as conveniently may be) agreeable to the *laws, and statutes, and rights*, of this our kingdom of England." *Sect. IV. and V., Weiss & B. 2.*

The charter of privileges, granted by the proprietary the 28th October, 1701, contains that provision for liberty of conscience, and religious worship, which "sure of immortality, is slowly, but firmly, asserting its power over the legislation of Great Britain." "Because no people can be truly happy, though under the greatest enjoyment of civil liberties, if abridged of the freedom of their conscience, as to their religious profession and worship: and Almighty God being the only Lord of conscience, Father of Lights and Spirits, and the Author as well as Object of all divine knowledge, faith, and worship, who only doth enlighten the mind, and persuade and convince the understandings of people: I do hereby grant and declare, that no person or persons, inhabiting in this province or territories, who shall confess one Almighty God, the Creator, upholder, and ruler of the

world, and profess him or themselves obliged to live quietly under the civil government, shall be in any case molested, or prejudiced, in his or their person or estate, because of his or their conscientious persuasion or practice, nor be compelled to frequent or maintain any religious worship, place, or ministry, contrary to his or their mind, or to do or suffer any other act or thing, contrary to their religious persuasion." *Weiss & B.*, 8.

Can it be maintained, that with this body of the law of England thus transferred, together with this noble declaration for the rights of conscience—all that was wanting to make that law the glory of the earth, the nursing mother of all her children, whether Churchman or Sectarian, Catholic or Protestant—can it be maintained that the people of Pennsylvania did not possess the law of charitable uses, by which alone they could enjoy the portion of earth, on which their conscience commanded them to erect a church for the worship of God, or which they might set apart for the Christian interment of their kindred, or to build schools for the instruction of their youth, or almshouses for the succour of the sick, aged, or impotent poor? Are not religious people prejudiced in their estate, because of their conscientious persuasion, when they cannot secure the portion of it that is necessary for the performance of the great practical duties of religion—the worship of God—the instruction of the ignorant—the relief of the poor, and the diffusion of Christian knowledge to all the people of the earth? Have they freedom of conscience as to their religious profession, if they must hold it by charters of incorporation, which the Proprietary or the State is at liberty to give or withhold at pleasure?

I have already submitted to the court, and I repeat it with the assurance of a settled conviction, that the right of bestowing lands or goods in charity, be it for the propagation of religion, or for education, or for relief to the destitute, is a right of conscience, a part of "religious profession and worship;" and that if the law, while it proclaims freedom of conscience, denies the enjoyment of it in these forms, or what is the same thing in principle, makes it wholly dependent on the special grant and pleasure of the legislature, it is a solecism, and a hypocritical pretence. The right of the public to regulate the enjoyment, so as to prevent mischief to individuals or the public, is a different question; but there can be no true freedom of conscience, where the performance of this great practical duty of religion, is denied to any man or body of men who sincerely profess their obligation to live quietly under the civil government, and whose acts are not in conflict with this profession. So have the people of Pennsylvania thought at all times, and so it will be seen they have most plainly and solemnly declared.

There have been some occasions, in which the legislature and the courts of Pennsylvania, have in an emphatic manner, declared

the rule of the common law, and of the principles of equity, as a part or supplement of that law, within the Colony and State.

The first penal code, the basis of the criminal law of Pennsylvania, "An Act for the advancement of Justice, and more certain administration thereof," passed the 31st May, 1718, 1 *Smith*, 105, after reciting the clause of the 6th section of the charter, which declares that the laws for the regulation of property in the colony, shall continue the same as they should be for the time being, by the general course of the law in England, until altered by the Proprietary and freemen, proceeds further to declare in its preamble, that "it is a *settled point*, that as the common law is the birth-right of English subjects, so it ought to be their rule in British dominions."

In *Morris's Lessee v. Vanderen*, 1 *Dall.* 67, McKean, C. J. said, "it is the opinion of the court, that the common law has always been in force in Pennsylvania." To the same point is *Respub. v. Mesca*, 1 *Dall.* 73, and the acts of 31st May, 1718, and 28th Jan. 1777, 1 *Smith* 105, 429.

In the case of *Lyle v. Richards*, 9 *Ser. & Raw.* 320, the decision of the court affirmed in the broadest manner, the extension of the whole body of the common law, with such exceptions only as could be shown by those who alleged them. It was a case that thoroughly tried the principle, for it turned upon the power of a tenant for life to bar contingent remainders in tail and in fee by a common recovery, the testator having in a strict settlement of his estate, omitted a devise to trustees to support the remainders; and there was no precedent of the use of a common recovery in such a case, though there were several of its being used to bar estates tail in possession before the act of 1749-50, which expressly authorized its use for such estates.

In *Pollard v. Shaffer*, 1 *Dall.* 214, the same court say, that "Equity is a part of the law of Pennsylvania." "For although we have not the Chancery forms or methods of carrying several equitable cases into execution, yet we are to determine where we may, according to equity, as making a part of the law, to prevent a failure of justice." From 1720 to 1736, Pennsylvania had courts of Chancery, and exercised equity powers generally to enforce equity principles. Most of the powers were lost, with the loss of the courts; but the loss of the powers never impaired the use of the principles in any case, where the principles could be otherwise carried into effect.

In *Ebert v. Wood*, 1 *Binn.* 217, Chief Justice Tilghman would not suffer the point to be argued, conceiving it to be perfectly settled. In *Jordan v. Cooper*, 3 *Ser. & Raw.* 578, the court held that equitable pleas in defence might be used against demands at common law. The common law powers of our courts have been invariably applied, wherever practicable, to enforce the principles of equity. In this form the solvent estate of a deceased

partner may be reached, where the survivor is bankrupt. *Lang v. Keppeler*, 1 Binn. 479. Specific performance is obtained through conditional or cautionary verdicts. *Hawn v. Norris*, 4 Binn. 77. The action of ejectment is in all cases that call for it, a bill in equity; *Peebles v. Reading*, 8 Ser. & R. 484; and many other cases of the like nature might be cited.

In the first act of the Commonwealth, after the Constitution of 1776, "An Act to revive and put in force, so much of the late laws of the Province of Pennsylvania, as is judged necessary to be in force in this Commonwealth," passed the 28th January, 1777, 1 *Smith*, 429, obedience to the common law is enjoined and required of all persons, as distinctly as it is in regard to the acts of Assembly that were in force before the Declaration of Independence. The full and perfect adoption of the law of England, appears throughout the reports of decisions in this State, with but few and inconsiderable exceptions, which are always to be made out by those who assert their existence.

It is in consequence of the obligatory force of the Common Law of England, and of the equity principles enforced in Chancery, that no act of assembly has ever been enacted or wanted, to protect charitable uses generally. No act of assembly has ever been passed, to authorize the dedication of property to public use, or to the maintenance of schools, or for the relief of the poor. Yet such institutions have existed and abounded from the beginning. The general law of the State, derived from England, has always been their authority and protection.

An act of the 6th February, 1731, entitled, "An Act for the enabling religious societies of Protestants within this Province, to purchase lands for burial grounds, churches, houses of worship, schools, &c.," 1 *Smith*, 192, has been the main reliance of the complainants' counsel, in their effort to show that the law of Pennsylvania never recognised the doctrine of charitable uses. It is said to imply in the clearest manner, a *negation* of all existing charitable uses, and to have been enacted for the sole purpose of giving effect to certain of them, to a certain and limited extent only. I am content to take this act as the hinge of the whole controversy, and so undoubtedly it will be found to be.

The third section enacts in terms—"that it shall and may be lawful to and for *any religious society of Protestants*, within this Province, to purchase, take, and receive, [lands and tenements] by gift, grant, or otherwise, for burying grounds, erecting churches, houses of religious worship, schools, and almshouses, for any estate whatsoever, and to hold the same for the uses aforesaid, of the Lord of the Fee, by the accustomed rents. Provided always, that nothing in this act contained, shall be deemed taken or construed, to enable *any of the said religious societies*, or any person or persons whatsoever, in trust for them, or to

their use, to purchase, take, or receive, any lands or tenements, by gift, grant, or otherwise, for or towards the *maintenance or support* of the said churches, houses of worship, schools, or almshouses, or the people belonging to the same, or for any other use or purpose, save for the uses in this act before mentioned."

The section, it may be remarked, is confined to *religious societies of Protestants*. It has no relation to schools and almshouses generally. The proviso has the like exclusive reference to the said religious societies, and to persons in trust for them, or to their use. It neither contains nor implies a negative. It is an affirmative enactment, to authorize such societies to purchase lands or tenements for burying grounds, and for erecting churches, schools, and almshouses, with a proviso that *the Act* shall not be construed to enable them, or persons in trust for them, to purchase or receive lands for the maintenance of such churches, &c. It undoubtedly implies that some impediments existed, or were alleged to exist, in the general law, in regard to purchases by such religious societies for such objects; and it is apparently with a very jealous and niggard spirit, that it in any degree obviates them. But looking only at its enactments, without reference to some other law, it is inexplicable. If it contains all the law of Pennsylvania in regard to religious and charitable foundations, it exhibits a community in which, in general, there could have been neither religion nor charity; for supposing the people to have been religious and humane, which they professed to be, it is the strangest of all phenomena, that their law makers should expressly exclude the inference that the act meant to authorize acquisitions of property by religious societies, for the maintenance of schools and almshouses, if there was not some general law to fall back upon. It is not surprising, that without possessing the key to the act, different opinions have been entertained in regard to it. The complainants do not stand alone in mistaking its meaning. Others have been as far from it as they are—though it is impossible to be farther. But by the historical and legal details that it will be my duty to give, it will be found to be of the easiest interpretation possible, to be part of one of the most interesting chapters in the colonial history of Pennsylvania, and to furnish irrefragable proof of the general colonial assent to the validity of all charitable uses.

I must ask the court to go back for a moment to the statute of 23 H. VIII. c. 10, sometimes called "the Statute of Mortmain," Boyle, 268, as the act of 9 Geo. 2, c. 36, restraining gifts to charitable uses, is universally called. It declared, among other things, that by reason of assurances of lands and tenements, upon trust to the use of *parish churches*, fraternities, and companies made by common assent without any corporation, the same losses and inconveniences accrued to the king and to the

other lords and subjects of the realm, as in case where lands were "aliened into Mortmain;" and it therefore, with certain particular exceptions, made them utterly void.

This statute has finally obtained the name of the Statute against Superstitious Uses, the decisions in Queen Elizabeth's time having confined its effect to uses of that description.

A superstitious use, according to the Law of England, indeed according to the law of all countries, is, and can only be, a use which has for its object the propagation or the rites of a religion not tolerated by law. Mr. Boyle in his *Treatise* so defines it. *Boyle*, 242. There can be no religious superstition in the legal sense, where the law shows the respect of equal toleration to all religions; and we must therefore acknowledge the propriety of the decision of the Supreme Court of Pennsylvania, in *McGirr v. Aaron*, 1 *Penns. Rep.* 49, though it sustained a devise to a priest and his successors, to have an obit perpetual, or anniversary service for the soul of the deceased, which is one of the uses expressly prohibited by the 23 *H. VIII.* Judge Addison, the President of the Common Pleas in Westmoreland county, had sustained the same use forty years before. *Lessee of Browers v. Fromme*, *Addis. Rep.* 362.*

The history of religious toleration is of course necessarily connected with the history and fate of superstitious uses in England.

The first establishment of the Church of England, after the Reformation, was made in 1548 by 2 and 3 *Edw. VI.* c. 1.—"An act for uniformity of service and administration of the sacraments throughout the realm." 5 *Pick.* 286. This statute adopted "the Book of Common Prayer and administration of the sacraments, and other rites and ceremonies of the church, after the use of the Church of England," then recently prepared and concluded by the Archbishop of Canterbury, and "certain of the most learned and discreet bishops, and other learned men of the realm," by the king appointed to consider and ponder the premises: and it enacted that "all and singular ministers in any cathedral or parish church, or other place within the realm," should use "the mattins, evensong, celebration of the Lord's Supper, called the mass, and administration of each of the sacraments, and all their common and open prayer, in such order and form as is mentioned in the same book, and none other or otherwise;" and it defined "open prayer" to mean "that prayer which is for other to come unto or hear, either in common churches or private chapels, or oratories, commonly called the service of the church."

* Sir C. Pepys, M. R., held that such a use is superstitious and void, even under 2 and 3 *Will. IV.* c. 115, though by that statute Roman Catholics are enabled to make dispositions of property in respect of their schools, places of religious worship, education and charitable purposes. *West v. Shuttleworth*, 2 *Mylne & K.* 684.

The penalties were directed chiefly against ministers, namely "any manner of parson, vicar, or other whatsoever minister," who should refuse to use the same form in such cathedral or parish church, or other places, or should use, wilfully and obstinately standing in the same, any other rite, ceremony or form; and they amounted finally to imprisonment for life, and the loss of all spiritual promotions, if the offender had any. Persons compelling or otherwise procuring and maintaining any such minister to say any common and open prayer, or to minister any sacrament in any other manner or form, were likewise subjected by the statute to fine and imprisonment, extending finally to forfeiture of goods and chattels, and imprisonment for life.

Another statute of the same king, 5 and 6 *Edw. VI. c. 1*, compelled all persons inhabiting within the realm, "or any other the king's majesty's dominions," upon pain of punishment by the censures of the church, to resort to their parish church or chapel accustomed, or upon reasonable let thereof to some usual place where common prayer should be used, and there to abide during the time of common prayer. 5 *Pick. 349*.

In 1553, these statutes were repealed by 1 *Mary, Sess. 2, c. 2*, which was itself repealed in 1558 by 1 *Éliz. c. 2*, entitled, "An act for the uniformity of common prayer and service in the church, and administration of the sacraments." 6 *Pick. 117*. The Book of Common Prayer with certain alterations and additions, referred to in the statute, was re-established, and the penalties were repeated and enlarged against ministers and people.

The events of the "Commonwealth" put an end to the church establishment, and substituted for it an intolerance in the opposite direction, equally severe, and perhaps more severely enforced.

Upon the restoration of Charles II. in 1662, after a review of the Book of Common Prayer, and certain alterations by the Convocations of both the provinces of Canterbury and York, an act was passed, entitled "An act for the uniformity of public prayers and administration of sacraments, and other rites and ceremonies, and for establishing the form of making, ordaining and consecrating bishops, priests and deacons in the Church of England." 13 and 14 *Car. II. c. 14*. 8 *Pick. 47*.

This statute adopted the book so reviewed and altered. It compelled all ministers in any cathedral, collegiate or parish church or chapel, or other place of public worship within the realm of England, dominion of Wales, and town of Berwick upon Tweed, to say and use the prayers, &c., in such order and form as is mentioned in the book; and required of every person, vicar or other minister whatsoever, who then enjoyed any ecclesiastical benefice or promotion within the realm or places afore-

said, before a certain time publicly to read in his church the morning and evening prayer appointed to be read, and to declare openly in a form prescribed by the statute, his unfeigned assent and consent to every thing contained and prescribed in and by the book; and in case of neglect or refusal, without some lawful impediment, to be allowed by the ordinary, declared him to be *ipso facto* deprived of all his spiritual promotions, and allowed the patrons and donors to present or collate to the same, as if the persons so offending or neglecting were dead. It further enacted, that no person under pain of imprisonment, should preach or read any sermon or lecture in any church, chapel or other place of public worship, unless he was approved and licensed by the archbishop of the province, or bishop of the diocese, and should in his presence read and declare his assent to the thirty-nine articles, and at the times appointed in the statute, before his sermon or lecture, read and publicly declare his assent to the book of common prayer, and to the use of all the prayers, rites and ceremonies therein prescribed; and it confirmed the laws and statutes formerly made for uniformity of common prayer, and directed them to be put in use for the punishment of all offences contrary to the said laws, with relation to the book so reviewed by the Convocations, and no other.

Such was the state of the church establishment in England, at the date of the charter of Charles II. to William Penn, and for some years after it. It allowed no toleration to Roman Catholic, Presbyterian, Baptist, Quaker, or Jew.

While these statutes of uniformity were in full vigour, all uses for the support of the churches, ministers or religious societies of Roman Catholics, Jews, and all the bodies comprehended under the name of Protestant dissenters, were deemed superstitious uses, and were void in law. If of land, they were void under the 23 *Hen. VIII.* If of money, goods, or chattels, they were equally void by the principles of public policy.

Croft v. Evetts, Moore 784, in the time of James I., was the case of a conveyance by a Popish recusant to several persons, also Popish recusants, in trust after the death of the donor and his wife, to bestow the rents upon poor scholars, in Oxford, Cambridge or elsewhere, who should intend to profess and study divinity, and enter into holy orders, *according to the intention of the donor.* A bill was filed in Chancery after the donor's death, and Lord Ellesmere called to his aid the master of the rolls and the two chief justices, who were of opinion that if the profits of the land should be applied according to the intention of the donor, they would be given to maintain Jesuits and seminary priests. The trusts were therefore declared void, and the feoffees were decreed to dispose of the land according to the direction of the heir.

Lady Portington's case, in 4 *Will. & Mary*, 1 *Salk.* 162, de-

cided that "the king as head of the Commonwealth, is obliged by the common law, and for that purpose entrusted and empowered, to see that nothing be done to the disherison of the crown, or the propagation of a false religion, and to that end is entitled to pray a discovery of a trust of a superstitious use."

In *Combes's case*, in 1679, cited 2 *Vern.* 266, a bequest for maintenance of *independent* lectures in three market towns, was held void, and applied *Cy-pres* to catechetical of Church of England lectures.

Gates and Jones's case, cited in the same book and page, decided that a charity to maintain Popish priests was void, and should be applied to other good charitable uses by the king.

In 1684, the case of the *Attorney-General v. Richard Baxter*, the eminent divine, was settled in the same way by Lord Keeper North. A beneficed clergyman of the church of England, bequeathed to Mr. Baxter, then a conformist, though subsequently a nonconformist minister, six hundred pounds, to be distributed by him to sixty pious *ejected ministers*,—ministers ejected under the act of uniformity. The Lord Keeper held, 1st, that this was a superstitious use, and void; 2, that the charity was good and should be applied in *eodem genere*: and he accordingly decreed it for a Chaplain of Chelsea College, overruling the king, who by his sign manual had applied it to Chelsea Hospital. 1 *Eq. Ca. Abr.* 96. 1 *Vern.* 248.

Both points of this decision were of a nature to be extensively known among dissenters, from the great eminence of the defendant, and from the extraordinary violence done to the testator's will by the doctrine of *Cy-pres*: but there is no doubt, although this bequest was afterwards held to be a particular bequest, and not a charity, yet that the doctrine throughout has been sanctioned in many subsequent cases.

In 1688 came the Toleration Act of 1 *Will. & Mary*, c. 18—"An Act exempting their majesties' Protestant subjects, dissenting from the Church of England, from the penalties of certain laws." 9 *Pick.*, 19. All persons, not being Papists or Popish recusants, nor denying in their preaching or writing the doctrine of the Trinity, were by this statute exempted from the penalties of various acts of Parliament, the Act of Uniformity included, upon their subscribing the thirty-nine articles, with the exception of the 34th, 35th, 36th, and part of the 20th, and taking and subscribing certain oaths, or in the case of Quakers, making and subscribing certain declarations, of abjuration and fidelity.

It is under this act, which did not extend to the colony of Pennsylvania, that charitable uses for the maintenance or propagation of religion among certain denominations of Christians, not of the established church, are protected, and under this statute only.

In the *Attorney-General v. Eades*, cited 2 *Ves.* 273, in 1713,

Lord Chancellor Harcourt, notwithstanding the Toleration Act, declared void a charitable use for anabaptists, which he thought tended to draw people away from the church; but the case has not been followed.

Lord Chancellor King, in 1731, laid down the rule which has since universally prevailed. A devise was to the use "of such *nonconformist ministers* as preach God's word in places where people are not able to allow them a suitable maintenance, and to encourage the bringing up of some to the work of the ministry, who are designed to labour in God's vineyard among *dissenters*." It was objected that this was a *superstitious* use, comprehending any person opposed to the church, even Roman Catholic or Jew. Lord King said, "this cannot be a superstitious use within the statute; but the dissenters here meant are Protestant dissenters, acting under the Toleration Act of 1 W. & M., c. 18. All persons know who are meant by *dissenters*, to whom any use may now be raised." *Attorney-General v. Hickman*, 2 Eq. Ca. Abr. 193, pl. 14.

There is no protection for charitable uses to any religious body not belonging to the established church, except under the Toleration Act. All not embraced by that act, or in some subsequent act of larger toleration, are superstitious and void. *Lloyd v. Spillet*, 3 P. Wms., 344, by Lord Talbot, in 1734, follows the *Attorney-General v. Hickman*, as to *dissenters*. *Attorney-General v. Andrews*, 1 Ves. 225, by Lord Hardwicke, in 1741, as to *Quakers*. The *Attorney-General v. Cock*, 2 Ves. 273, in 1751, by Sir John Strange, M. R., in the case of *Baptists*. In the *Attorney-General v. Pearson*, 3 Merr., 409, Lord Eldon quotes Lord Mansfield's words—"The Toleration Act established dissent."

For religions not tolerated, there are no valid charitable uses. None for *supporting or teaching the religion of the Jews*. *Taylor's case*, 1 Ventr. 293; *Woolston's case*, Fitzgib. 64; *Villareal v. Mellish*, 2 Swanst. 539; *Da Costa v. De Paz*, Ambl. 228; *Bedford Charity*, 2 Swanst. 470. For maintenance of poor Jews on the contrary, and for their instruction in letters, they are good without the aid of the statute. *Ambl.* 228. 2 *Swanst.* 487.

So before 31 Geo. III., 10 Geo. IV., and 2 & 3 W. IV., charitable uses for the religion of the Roman Catholics were not valid; nor were they until lately for the education of Roman Catholic children, the effect of other provisions in the severe statutes of former days against the professors of this faith. *Cary v. Abbot*, 7 Ves. 490; *De Themmines v. Bonneval*, 5 Russ. 288; *Bradshawe v. Taske*, 2 Mylne & K. 221; *West v. Shuttleworth*, 2 Mylne & K. 684.

In connexion with this history of the law of religious charitable uses in England, it is necessary to mention three other statutes,

passed in England after the Charter of Pennsylvania, which have a bearing on what is to follow.

The statute of 7 & 8 *Will. III.*, c. 34, passed in 1696, permitted Quakers, within England, Wales, and Berwick upon Tweed, who should be required upon any lawful occasion to take an oath, where by law an oath was required, to make an affirmation or declaration "*in the presence of Almighty God*, the witness of the truth of what" they said; with a proviso, that no Quaker, or reputed Quaker, should by virtue of that act, be qualified or permitted to give evidence in any criminal cause, or serve on any juries, or bear any office or place of profit in the government. 9 *Pick.* 497. 499.

In 1706, 5 *Anne*, c. 6, "An Act for securing the Church of England as by law established," enacted that the Uniformity Act of 13 *Car. II.*, and all other acts then in force for the establishment and preservation of the Church of England, should remain and be in full force for ever; and that after the demise of her Majesty, the sovereign next succeeding, and every king or queen succeeding, should "take and subscribe an oath to maintain and preserve inviolably, the said settlement of the Church of England, and the doctrine, worship, discipline, and government thereof, as by law established, within the kingdoms of England and Ireland, the dominion of Wales, and the town of Berwick upon Tweed, and the territories thereunto belonging." 11 *Pick.* 194. 214.

The 1 *Geo. I. Stat.* 2, c. 6, in 1714, which made perpetual the 7 and 8 *W. III.* c. 34, in regard to affirmations by Quakers, prescribed the same form of affirmation for the declarations of abjuration and fidelity, and extended it expressly to the plantations: and this form continued to be prescribed until 1721, when the statute 8 *Geo. I.* c. 6, authorized the form now universally used in Pennsylvania, of "solemnly, sincerely and truly" declaring and affirming. 14 *Pick.* 378.

Clear as the motive and objects of the settlement of Pennsylvania were,—manifestly as on the part of the Proprietary and the colonists, it began and continued, as on the part of their descendants, it has ended, in a spirit of universal religious toleration, yet it is remarkable that there is not a word in the Charter of Charles II. securing that right to the colonists, and only one clause on the subject of religion, in the 22d section, and that of rather a contrary character; for it inhibits all annoyance to any preacher or preachers *approved by the Bishop of London*, and sent into the colony at the request of the inhabitants, to the number of twenty, expressing their desire to the bishop to that effect. The suspected faith of Charles II.—the well-known faith of the Duke of York, the friend of William Penn—and the prevalent though most unfounded doubts of Penn's own sincerity,

would have made a clause of general toleration in the charter, a theme of outcry against Popery in disguise. Whatever may have been the cause of this omission in the charter, it was clear, that so far as it professed toleration, it was only toleration for the Church of England, *as by law established*; and it will be shown, that this jealousy of dissent on the one hand, and a like jealousy of the church on the other,—manifesting itself variously, but among other forms, in the two great points of affirmations, and the estates of religious societies of Protestant dissenters, without any the least intermixture of the question of charitable uses generally—were the cause of a contest between the crown and the province, through the whole reign of Queen Anne, to the end of George I.; and though it was mitigated at the close of his reign, and still further in the reign of George II., yet that so much of it as regarded charitable uses for the propagation of religion, was extinguished, with the principle on which they were resisted, only by the Revolution of 1776.

The habitual jealousy with which Great Britain observed the progress of these colonies in civil and religious freedom, is a proof, not so much of a despotic temper, as of prophetic forecast. Her most liberal statesmen united with the narrowest, in keeping fetters and restraints upon the colonies, which they had long torn from their own limbs, and broken to pieces. They saw into what a new being unfettered colonies would soon start, and escape from them. Where they could not impose new restraints, they were slow to remove any of the old ones; and they preferred uneasy, and restless and discontented children, growing up in ill-will to their parent, and looking forward with ardour to the time when by their own strength they might break their bonds, rather than rear up with liberal care to the age of necessary emancipation, offspring that would be held by the bond of affection, after all other bonds were dissolved. The name of Somers, dear to every friend of constitutional freedom, may be found at the head of the council, that in 1695 denied the benefit of the Habeas Corpus Act to Massachusetts,—years after the 31 *Car. II.* had secured it to British subjects. Sir William Berkley's answer to the Lords of the Committee of Colonies, though it now sounds strangely as a voice from "Old Virginia," was in the true spirit of the mother country. "The same course is taken here, for instructing the people, as there is in England: out of towns every man instructs his own children according to his ability." "I thank God, there are no free schools, nor printing,—and I hope we shall not have these hundred years; for learning has brought disobedience, and heresy and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both!"

King William died in 1702. He was no more of a church-

man than was necessary for his crown; and with the exception of a short period, when he seized the government of the colony into his own hands, upon the ground or pretext of arbitrary proceedings by the governor, or the colonial magistrates, against Keith, an opponent of the Quakers, and a separatist from their faith, there was in general no disposition shown by the king to abridge the powers of legislation granted by the charter. He was friendly to the dissenters, lenient even to Papists; and being inclined to the free admission of all his Protestant subjects upon equal terms with churchmen, to all the honours and emoluments of office, was little disposed to deny to the Quakers in the colony, the free use of affirmations in the place of oaths, or to enforce among them discriminations which were odious to himself.

Queen Anne, on the other hand, was a High Churchwoman, attached to the church from conviction, and zealous in its behalf. She impoverished herself for the sake of its clergy; and, as was said, loved the church better than any thing upon earth, except Prince George, her husband. The Low Churchman, Hoadley, though recommended to the Queen for promotion, by the House of Commons, could get nothing from her majesty but the civil answer to the house, that she would "take a proper opportunity of complying with their desire," which she never found. He obtained his preferment from her successor; and in the change of church parties in these reigns, may be seen the cause of measures affecting the legislation of the colony of Pennsylvania.

The 26th and 35th laws agreed upon in England, together with the great law of 1682, by its first and second chapters, secured the use of affirmations, both for giving evidence generally, and as a qualification for office; and they also secured the amplest enjoyment of the rights of conscience. *Weiss & B. 1 App. 2.*

In 1693 and 1700, the Assembly passed other laws on the subject of affirmations, enforcing the same practice, and excluding oaths altogether. *Weiss & B. 4.*

On the 21st January, 1702-3, the queen by an order in council, required all persons in judicial or other office in the colony, before they should enter into office, to take the oath directed by the law of England, or the affirmation allowed by the said law to Quakers, and that no judge should be allowed to sit upon the bench, without having taken it; and that all persons who in England were obliged and were willing to take an oath in any public or judicial proceeding, should be admitted to do so by the proper officers and judges in the colony; in default of which, or upon the refusal of the judges to administer the oath, their proceedings should be void. This was the first measure of the Queen's reign, that was of sinister omen to the Quaker colony.

The Assembly on the 25th May, 1704, addressed the Queen

upon the subject of the order in council, protesting that in conscience they could not administer oaths, any more than they could take them. 1 *Votes of Assembly*, 2d part 6.

On the 7th Feb. 1705, the Queen in council repealed the act of 1700. *Weiss & B.* 18.

After a series of controversies with Governor Evans, on this subject, which, with other causes, disturbed the course of legislation, during the whole time he held office, the Assembly at last prevailed upon the Governor to sanction a law to the effect they desired, entitled "An Act directing the qualifications of all magistrates and officers, as also the manner of giving evidence;" and on the 12th January, 1705-6, they addressed the Queen a second time, and prayed her graciously to confirm it. *Weiss & B.* 43. 1 *Votes of Assembly*, 2d part 91. They explicitly informed the Queen, that the greatest number of inhabitants in the province could not administer oaths, nor be parties thereto; and that there was danger of failure of justice, by an adherence to the order. The statute of 7 and 8 William, did not permit an affirmation at all, as a qualification for office, though it did for giving evidence in certain cases; and though the order in council did allow it, it allowed it in the form of an invocation of the Deity, almost as objectionable to the Quakers as an oath itself. *Gord. Hist. Penn.* 131. The Queen nevertheless on the 24th Oct. 1709, repealed the Act of Assembly. *Weiss & B.* 131.

With the subject of affirmations, the Assembly soon connected a bill to authorize religious societies to purchase and hold lands.

A church party had now grown up in the colony, desirous of having the government surrendered to the crown, as a counterpoise to the growing numbers and authority of the Quakers, who in some measure were thought to regard Quakerism as the established religion. *Gord.* 126, 130.

The Uniformity Act of Charles II. before the charter—the Toleration Act afterwards, which did not extend to the colonies—the 8th section of 5th *Anne*, c. 8, extending the establishment to England and "the territories thereof," which by some was interpreted to include the colonies—the absence of all express toleration in the charter,—and the tendencies of Queen Anne's reign to spread the influence of the Church of England, made the position of the property of the other churches in the colony, a subject of great uneasiness, and the more so from the pertinacious refusal of the crown, to permit any law in relief of conscientious scruples in regard to oaths.

The Assembly endeavoured in the first instance to attain their ends as to the property of religious societies, in a quiet way, by connecting the enactment with another measure; but Governor Evans was wide awake upon the subject, and requested it to be separated and placed in a bill by itself. 1 *Votes of Assembly*, part 2, pp. 63, 71. Such a bill was passed and sent to the Governor

on the 20th December, 1705. It was pending of course at the same time with the affirmation bill.

The votes of assembly bear evidence of the importunities of the House, during the same session, to obtain the Governor's assent. 1 *Votes Ass. 2d part.* 76, 88. They renewed them the subsequent session, in December, 1706, 1 *Votes Ass., 2d part,* 124; and on the 28th of that month, in a formal answer to a message from the Governor, with a statement of many grievances, they concluded by saying—"and in the interim, we earnestly desire the Governor to descend to some result upon the bill for empowering religious societies to buy and sell lands, which was laid before him by the last Assembly, and highly affects all those societies, *who are not of the community of the Church of England*, though proper objects of the Queen's indulgence." 1 *Votes of Ass. 2d part,* 130. But the Governor made no reply.

They renewed the bill on the 21st March, 1707, 1 *Votes of Ass., 2d part,* 163, and again on the 26th August, 1709, 2 *Votes of Ass.* 50; and on the 29th September in the same year, followed it with a remonstrance to the Governor, at the close of the session, enumerating several bills which still remained without his concurrence, this bill among the number, of which they say—"The Governor has pleased to tell us, that some of the Church of England had showed their dislike to the passing of that bill about religious societies, and therefore he must be cautious. It is a most lamentable account we have to give the people of the public affairs of the Province. The religious meeting-houses of *Protestant dissenting subjects*, are left exposed to the danger of the *statute of Mortmain.*" 2 *Votes of Ass.* 59.

The House finally appointed a committee to wait upon the Governor on the subject; and on the 15th February, 1710-11, the minutes of Council show the following disposition of it—"Two members of the House, T. S. and J. T., waited upon the Governor, and desired his answer to two or three bills now before him; and the following answer was ordered to be sent thereto. As to the act for empowering religious societies to dispose of lands, &c.—the Governor, observing the great care of our ancestors in Great Britain, obvious by the laws and statutes there, and for the prevention of the great hurt and inconveniences which had risen, and might rise, from suffering of communities or religious societies, to assume to themselves like powers or practices as proposed by this bill, is not willing at present to concur in it, lest it should interfere with those laws in a thing of so great import, the consequence whereof being yet to him dubious and uncertain, thinks fit to take some further time of deliberation and enquiry touching the same." 2 *Colonial Records,* 551.

By this statement of the proceedings of the Assembly, and the Governor in Council, in regard to the religious societies bill, we

are as well possessed of the motives for proposing and rejecting it, as if it were a transaction of the present day. The evil apprehended by the Assembly, was, that in the then supposed or suggested state of the law, the property of religious dissenters from the church was without protection. Those in the Colony who belonged to the community of the Church of England, were safe in their churches, and in charitable gifts for their use, being within the benefit of the establishment; dissenting Protestants of every other denomination, were exposed to the *statute of Mortmain*—not to the more ancient statutes of Mortmain, which had reference only to corporate bodies, but to the statute of 23 H. VIII., the statute against superstitious uses, then known by the name of the Statute of Mortmain, which extended to societies and associations without incorporation; and the Governor justifies the apprehension of the Assembly, by saying, that some of the Church of England had shown their dislike to the passing of the bill; and finally, that he must take further time for deliberation and inquiry, lest it should interfere with the laws of England in regard to religious societies.

How was it possible for the learned counsel who opened this cause, to argue, that the act of 1731 was intended to give validity to a specific charitable use, because the common law of Pennsylvania did not recognise such uses generally? Or how, with this reference to *the Church of England, the statute of Mortmain, and the laws of England in regard to religious dissenters*, could any thing, but the instinct of self-preservation, have led him away from the true interpretation? The object of the act was to counteract religious intolerance, and to place all Protestant religious societies on the same footing, on which the church stood in England, and also in the Colony. What protected a charitable use to a church in Pennsylvania, of the communion of the English establishment, which it was agreed was not in want of the act? What could have protected such a use, but the general doctrine of charitable uses? When this question is answered, the point will be settled. That church community could hold such a use only by the common law of Pennsylvania, and the general principles of equity.

Finally, in the course of many years of bitter party controversy, the Governor, and James Logan, the Secretary, on one side, and the Assembly and David Lloyd, their leader, on the other, sufficient impression was made by the Assembly to obtain from the Governor his assent to an affirmation law, and to a religious societies law. On the 7th June, 1712, he assented to them both, or rather turned over the controversy to the Queen in council. *Weiss & B.* 50. On the 20th February, 1713, the Queen in council disallowed and repealed them both. *Weiss & B.* 51.

On the 28th May, 1715, after the Queen's death, the Assembly

passed them again, and the Governor again assented to them. *Weiss & B.* 56. And on the 21st July, 1719, George I. not being then prepared for a different policy, repealed them in council. *Weiss & B.* 74. Although it was usual for the Crown to communicate to the colonies the reasons for the repeal of laws which did not meet the royal approbation, the reasons for repealing these were not directed to be communicated, nor were they communicated. *Weiss & B.* 74. It was a delicate subject. All the laws repealed on that day, the 21st July, 1719, had been the occasion of a bitter and vindictive feud between the Assembly and two Governors, Evans and Gookin, for ten years. Gookin's recall, and the substitution of Sir William Keith, in some measure closed the controversy.

It is necessary to refer to the provisions of the laws which were thus twice passed and repealed. The two were identically the same, with the exception of a few words, the act of 1715 leaving out the last eleven words in the act of 1712, to avoid, perhaps, the indecorum of returning the same act, *verbis et literis*, that had already been disallowed.

The act of 7th June, 1712, is in Bradford's edition of the laws, page 160.* The first section is a grant of authority to all religious societies of Protestants within the Province, to purchase any lands or tenements, without limitation as to quantity, for burial grounds, and for erecting houses of religious worship, schools, and hospitals, and by trustees, or otherwise, to take grants or conveyances for the same.

The second section ratifies and confirms all grants of land, &c.,

* It is in these words :

Act 10 Anne, Ch. VI.

"An Act for empowering religious societies to buy, hold and enjoy lands, tenements and hereditaments.

"I. Be it enacted, &c., That it shall and may be lawful to and for all religious societies, or assemblies and congregations of Protestants, within this province, to purchase any lands or tenements for burying grounds, and for erecting houses of religious worship, schools and hospitals, and by trustees, or otherwise, as they shall think fit, to receive and take grants or conveyances for the same, for any estate whatsoever, to and for the use or uses aforesaid, to be holden of the lord of the fee, by the accustomed rents and services.

"II. And be it further enacted by the authority aforesaid, That all sales, gifts or grants made to any of the said societies, or to any person or persons in trust for them, or any of them, of, for, or concerning any lands, tenements or hereditaments within this province, for and in any estate whatsoever, shall be, and are by this act ratified and confirmed, according to the tenor and true meaning thereof, and of the parties concerned therein.

"III. And where any gifts, legacies or bequests have been or shall be made by any person or persons, to the poor of any of the said respective religious societies, or to or for the use or service of any meeting or congregation of the said respective societies, the same gifts and bequests shall be employed *only* to those charitable uses, or to the use of those respective societies or meetings, or to the poor people to whom the same are or shall be given, or intended to be given or granted, according to what may be collected to be the true intent and meaning of the respective donors or grantors, [notwithstanding any failure or defect in their gifts, grants, or bequests.]"

within the Province, that had been made to such societies, or to any persons in trust for them.

The third section is introduced solely to reject the doctrine of *Cypres*, in the case of defective gifts; and does by necessary implication, admit the general validity of charitable uses for the poor, and for religious meetings and congregations. It does not give authority to any one to make or receive such gifts. It does not confirm such as had been made or received. It does not say they shall be good generally. None of these provisions were necessary. It says they shall be good *only* to those charitable uses, or to the use of those societies or meetings, or to the poor people, to whom the same were intended to be given. I can conceive of no stronger negative attestation to the prevalence of the general law of charitable uses at that day.

The necessity of any act of Assembly to protect charities for the propagation of religion, is not asserted by me. I have no doubt that it was wholly unnecessary, upon a just interpretation of the charter, and upon a just view of the principle which had always prevailed in the colony, that only so much of the previous statute law of England was in force, as was convenient and adapted to the circumstances of the colony. The extension of the statute of uniformity could not be maintained as either convenient or adapted to the circumstances of the colony. It was as remote as possible from either; and the express extension of it by 5th Anne, was wholly indefensible upon a sound construction of that statute. But there were some who supported the opposite construction; and it is to be recollected, that the opposite construction was in favour of the crown, and that the crown favoured it, and therefore that the apprehensions of the colonists were reasonable, and their precaution a wise one.

So late as 1757, we have evidence that the pretensions made on behalf of the church, were not universally surrendered. Dr. Bisse, the Bishop of Hereford, in a sermon preached before the society for the propagation of the Gospel, on 21st February, 1717, expressed his opinion that it was the duty of the government to extend the establishment to the colonies. Bishop Gibson, the author of the Codex, did, it is true, in a letter of 24th May, 1735, to Dr. Coleman, of Boston, express a sounder and more authoritative opinion. "My opinion," he says, "has always been, that the religious state of New England, is founded in equal liberty to all Protestants, none of which can claim the name of a national establishment, or any kind of superiority of the rest." But in 1755 the opinions of counsel were still taken upon the subject, and the work that records this as a still subsisting controversy, was printed in 1757. *Smith's History of New York*, ch. iv. p. 218.*

* The 4th chapter of Smith's History, is entitled "of our Religious State." After describing the religious denominations in the colony, Episcopalians, Dutch and

In 1721, the statute of 8 *Geo.* 1, c. 6, showed a kinder spirit to the Quakers, by allowing them a form of affirmation in making the declaration of allegiance, &c., without an express invocation of Deity; and under the government of Sir W. Keith, a man of popular manners, this example soon had the effect of disposing the assembly to renew, in a modified way, the provisions that had been so frequently disallowed. The 3d section of the act of 31st May, 1718, 1 *Smith*, 111, had provided that all cases whatever, criminal or otherwise, might be inquired of, heard, tried and determined by judges, justices, inquests and witnesses, qualifying themselves according to their conscientious persuasion respectively, either by corporal oath, or by the solemn affirmation allowed by act of Parliament to those called Quakers in Great Britain; and then cautiously making the operation of the law they proposed in regard to qualifications for office, and the declaration of fidelity and abjuration, dependent on the pleasure of the crown, they obtained Sir William Keith's assent to an act of 9th May, 1724, which prescribed the form of affirmation, since universally used in Pennsylvania, for all cases of affirmation whatever. *Weiss & B.* 100.

A tardy assent of the crown to this act was obtained in 1727, the last year of George I., and thus one part of the controversy was disposed of. 2 *Proud*, 191, 194. It may be reasonably supposed that the act was indebted for its success to the policy which elevated Lord Chancellor King to the seals, in 1725, and which continued to his death, in 1733. The principles of Sir Peter King were in harmony with the colonists in regard to both these questions,—affirmations, and liberty of religious dissent. He had been favourable to the comprehension of the dissenters within the pale of the Established Church, and had written "An Inquiry into the Constitution of the Primitive Church," with a view to this object. He was a low churchman,—not a strong

English Presbyterians, the government of their churches, &c., the author says:—"The dominion of all our clergy is as it ought to be, merely spiritual. The Episcopalians, however, sometimes pretend that the ecclesiastical establishment in South Britain, extends here; but the whole body of the dissenters are averse to the doctrine. The point has been discussed with great fervour; and the sum of the arguments against it, is contained in a late paper, which I shall lay before the reader at large, without any additional reflections. It was published in September, 1753, under the title of the Independent Reflector, and is in these words:—"and then he sets it out, beginning with its motto—

Eripe turpi
Colla iugo: liber, liber sum, dic age.

The argument for the establishment is said to have turned pretty much on the statute 5 Anne, and the coronation oath. The principle sanctioned in Lady Portington's case, had also, no doubt, something to do with the question. But I have never met any work that openly and seriously asserted the doctrine, with reference to the law authorities.

chancellor, but a very conscientious one, and made the decree in the *Attorney-General v. Hickman*, in 1731, so favourable to charitable uses for all who were within the Toleration Act.

While Lord Chancellor King was at the head of the Privy Council, it was a favourable time, one of the *molliora tempora fandi*, to introduce again the subject of the religious societies bill; and therefore in the session of the Legislature of Pennsylvania, in January, 1731, that act, the history of which has been so imperfectly understood, was again put on its passage through the Assembly. The votes of Assembly, or the act itself, cannot be read without perceiving, that it was introduced in a very apprehensive temper, anxious to conciliate favour with the crown, by assigning as its principal motive the correction of gross misconduct in the trustees of religious societies who had misappropriated such charities, of which probably there was no alleged example but one, and that by no means without justification. It confirms past grants to trustees for the sites of houses of religious worship, &c., for the use of the respective religious societies, for whose use they were given; and declares all grants by trustees, &c., to be for the use of the respective societies *who had been in peaceable possession for twenty-one years before the 10th of June, 1730, OR, for whose use the same were first given, and no other*—the very language that was necessary to maintain the case of the alleged misappropriation in favour of a society of dissenters, against a like misappropriation in favour of a church. As to the past, therefore, the act purports simply to be a defence against flagrant breach of trust and wrong. As to the future, the enactment in favour of such societies is so meagre, and inconsiderable, that it was scarcely possible for crown or church to have any jealousy of it. It protects nothing but the very ground of the church, cemetery, school house, or hospital,—excluding all implied support from the act, to any acquisition for the purpose of maintaining either. If the crown should disallow this, it was clear that nothing would be allowed. The Assembly gave up nearly the whole of the enactments of 1712 and 1715, and interfered to the smallest extent possible with that spirit of intolerance, which had proved in former years too strong for either of those enactments. Still, however, it cautiously avoids every expression, which might be construed to prejudice the rights of the people and of the colony, by denying or negating them in any particular, expressly, or by implication.

The pretended misappropriation of a trust, that was made the occasion or colour for the act of 1731, was the conveyance of a lot of ground by the surviving trustee of a society of Keithian Quakers, as they were called, to Christ Church, in Philadelphia, against whom a Baptist society, claiming under a conveyance by two or three of the original cestuy que trusts, had taken and

held possession. The merits of the dispute are of no influence. The parties were heard before the Assembly, 3 *Votes of Assembly*, 145; and a remonstrance against the act was made by Christ Church to the Governor, the original of which still exists in the office of Secretary of the Commonwealth. It has appended to it a statement of the case, and a professional argument, which show at least, that the doctrine of charitable uses was then understood to be generally in force in the Colony, and that the privileges of the established church were deemed by the author of the argument, to be greater than those of the Baptists.*

* "Case of the Keithian Meeting House, &c. January 29, 1730-31.

1692. "A number of Christian people called Quakers, subscribing to certain articles of faith, &c., purchased a lot of land, and built thereon a meeting house, or place of worship, which lot, &c. was conveyed to Thomas Budd, Thomas Peart, Ralph Ward, and James Poulter, in fee, of which society the said T. B., &c. were and contributed towards the purchase, &c.

"In which conveyance it is declared and agreed, that the said lot, &c., so granted, was upon trust, &c. that the said lot, &c., should forever be wholly and solely appropriated to the only use and behoof of the aforesaid Christian people, for a meeting house or place of worship, and for such other use and uses, as the said meeting or major part thereof, should see cause to appoint, allow, or approve of, so that said T. B. &c., converted not the same to their own use and benefit.

"And thereby the said T. B., T. P., R. W., and J. P., did covenant to surrender, yield up recovery, grant and assure the said lot, &c., unto such other person or persons, their heirs and assigns, forever, as the said meeting, or major part should nominate and appoint, if the same should at any time be required, which meeting was called the Keithian meeting.

"The meeting of said people, who so subscribed, was entirely dissolved—their teachers, with the major or great part of said people, became members of Christ Church, in Philadelphia, in particular the said T. P. and R. W., &c.

"That about the time of the dissolution of said society, the congregation of said church, by the unanimous consent of the people of said society, had the use of the meeting-house, and had the sacraments, and other parts of Divine worship, according to the constitution of that church *established by law*, administered and celebrated therein for some years, and continued until the church (before begun) was finished; all which evidently denote, that the Keithians inclined to favour the church congregation and worship; and as a further evidence of it, they surrendered up the said deed of trust to the members of that congregation. The meeting-house being vacant for some time, then the Sabbatarians and Anabaptists used the same alternately.

"1723. That the said trustees being dead, save the said T. P., who at the instance of divers that were members of said meeting, conveyed the said lot, &c., to certain members of said church, for charitable uses, as per declaration thereof appears, and the deed of trust, so surrendered to the said church members, and since to the trustees for said charitable use. N. B. Those who came over to said church, paid near two-thirds of the purchase money for said lot, &c.

"1725. The said Anabaptists pretending a right by possession, and in opposition to the above charitable donation and uses, procure some deeds in their favour, from three old women, that were as they allege, of said Keithian society, and also from John Budd, and William Bettridge, as representatives of others, that were of said Keithian meeting, &c., but now of the Baptist communion. That there is not now, nor has been any meeting of such Quakers, called Keithians, who subscribed as above, this thirty years past.

"That it is in proof, that Joan Lee, one of said three old women, upon the dissolution of said society, became, together with her husband William Lee, members of said church, and since became of the Anabaptist communion, which evidently demonstrates she is not of the principle of said Keithian Quakers, and so not one *cestuy que use*, &c.

"That the other two old women are of that communion also; and consequently

The Governor assented to the act, with an amendment; which perhaps is the final proviso, that saves the rights of all persons for three years from the publication of the act. Christ Church, as appears by their minutes, sent a remonstrance to the Crown; but its contents, after a careful search, have not been ascertained. They did not procure the disallowance or repeal of the act.

I have given the history of this act in more than usual detail, because it has been a stumbling block in the way of others, as well as of the complainants' counsel. I am unable to agree to the opinion which has been expressed in Pennsylvania, that the act shows the policy of the colony to confine such uses to inhabitants of the Province, or to have been adverse to charitable uses for the benefit of religious associations in the province, united with, or forming a part of a larger religious body, extending to other colonies or countries. Whether the yearly meeting of Friends in Pennsylvania, was at that time confined to such as were inhabitants of the province of Pennsylvania, I am unable to say; or whether any, and which, of the general religious associations now extending over the Union, and

the title which the Anabaptists claim from and under these three, is of no weight or value, being not from any who profess faith, &c., subscribed to as above, and so not from any cestuy que use, nor any who had the estate in law in them in trust or otherwise, nor was any act by them done, before the surviving trustee of said Keithians had executed his power. And all the rest of the subscribers for the Anabaptists being members of a different communion, from that which the donation was first intended to, make not any title for the same reason.

"The trustees for the church hold by deeds of lease and release, from the surviving joytenant and one of the most considerable subscribers towards the purchase, so by common law they have the right and legal possession in them.

"The deed of trust, made and subscribed by the trustees of the Keithian society, was surrendered up to church members, and by consent delivered, together with the conveyance of the estate, to the trustee members of the said church.

"That the use and application of the premises by them declared [a public school] is most extensive in point of charity, viz. to all Christians, without any violence to their consciences; whereas by the use which the Anabaptists would apply it to, it's confined to their sect only, which is not agreeable to the first intention, on which foundation they build their claim.

"Therefore by the rules of equity, (which will not destroy any deed that can be supported by reasonable construction) and *the law of charitable uses*, the trustees for the church are duly vested, and to be supported in their title by law and equity.

"*Argumentandi gratia*; Suppose the church members and Anabaptists, stand in equal competition. The civil law governs in courts of equity, which are the proper jurisdiction for decisions of matters of trust and charity. And what has been a rule in that law, still remains until altered by some subsequent law. It has been the established rule in civil law, that Anabaptists are excluded as incapable of holding any such donation. And it's not known that any law has been made since contrary, or to qualify them. *The church is established by law in England, and provided for and protected in express terms against any molestation, &c.*, by the Charter of this Province. Therefore, *as the church is respected in the eye of the law, and the said charter, and the Anabaptists not at least so much*, the church trustees have the preference in equity. Also, it is a settled rule in equity, that where there are two voluntary conveyances, he that hath the advantage at law, ought to have it. It is evident that by virtue of the deeds of lease and release aforesaid, the trustees for the church have the advantage at law; and it's not clear that the Anabaptists have any equitable title. In such cases, *equitas sequitur legem*. Therefore the trustees for the church have the best title, both by law and equity."

composed of what were called dissenters, were then in existence. There could have been no intention to exclude any such religious societies, if any there were. The view of the Assembly was, to escape as far as they could, from the jealous restraint of the crown, which pursued, and to some extent was able to enforce, a policy, contrary to the spirit of the charter, and contrary also, to the fair meaning and operation of the English statutes. I may remark at the same time, that in that kingdom there has never prevailed so narrow a spirit in the administration of charities, as to recognize no gifts by subjects of England, except such as were to be applied within her own dominions. The Court of Chancery has repeatedly ordered charitable gifts to be handed over to foreign trustees, to be altogether administered in foreign countries. *Campbell v. Earl of Radnor*, 1 Bro. Chan. Rep. 271, was a case of English charity to be distributed in Ireland. *Provost of Edinburgh v. Aubery*, Amb. 236, *Attorney-General v. Lepine*, 2 Swanst. 181, *Emery v. Hill*, 1 Russ. 112, in Scotland. *Attorney-General v. Stewart*, 3 Mer. 143, in the West Indies. *Martin v. Paxton*, cited 1 Russ. 116, in France. *Minet v. Vulliamy*, 1 Russ. 116, in Switzerland. *Attorney-General v. Stephens*, 3 Mylne & K. 347, in Portugal. *Society v. Attorney-General*, 3 Russ. 142, in America. The Smithsonian Legacy has been paid to the United States under a like decree. This is in the truly catholic spirit of charity itself. It comprehends all men of all countries as one family for the dispensation of the goods of this world, by those that have them, to those who have them not, and are suffering for the want of them.

The history of the dispute not only explains the design of the act, but it perfectly accounts, and alone accounts, for the public interest which the people of Pennsylvania took in the subject of charitable uses,—their deep resentment at the interference of the crown, with such as promoted the welfare of religious dissenting churches in the colony,—and their finally blending it with other oppressions of the mother country, as worthy of distinct notice and remedy in the constitution of government, which they framed at the commencement of the Revolution.

Perhaps no State in the Union has given the same sanction to charitable uses, as the State of Pennsylvania, and for the motives which this history brings to light. In the Constitution of 1776, the Plan or Frame of government embodies them as worthy of sanction by the fundamental law. "All religious societies, or bodies of men, heretofore united, or incorporated, for the advancement of religion or learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities, and estates which they were accustomed to enjoy, or could of right have enjoyed, under the laws and former constitution of this State." Sec. 45, 5 Smith, 430. The Declaration of rights asserts that "no authority can or ought to

be vested in or assumed by any power whatever, that shall in any case interfere with, or in *any manner control*, the right of conscience, in the free exercise of religious worship." *Sec. vi., 5 Smith, 425.* And this was declared to be a part of the constitution, "never to be violated on any pretence whatever." *Sec. 46, 5 Smith, 430.*

The constitution of 1790, consecrates the same principles by providing for schools and seminaries of learning, and by protecting the rights, privileges, immunities and estates of religious societies, *Art. vii. 3 Smith, xii.*; and at the first session of the legislature under this constitution, the general authority was given to the Supreme Court of the State, to incorporate all associations of citizens for any literary, charitable or religious purpose. Act of 6th April, 1791. *3 Smith, 20.*

We have in these Constitutions, a comprehension of bodies incorporated and unincorporated,—a distinct assertion of the *right* to charitable uses to a larger extent even, than the people had been permitted and accustomed to *enjoy them*,—a large detail of such uses, for learning, religion, piety and charity,—and a promise of perpetual protection and security to the privileges, immunities and estates, connected with the enjoyment of them. The statute of 43 *Eliz.* does not come up to this, and no statute could go beyond it. Pennsylvania has gone farther than England in her sanction to such uses. The Legislature of the State has gone farther than the British Parliament in the grant of corporate powers for purposes of charity; for while the statute 39 *Eliz.* confines the grant of corporate powers at the pleasure of individuals, to hospitals or *maisons de dieu*, the Legislature of the State has authorized the grant of them to associations for every species of religious, literary, or charitable purpose.

It is said the act of 1791, intended to limit these charitable gifts, by restricting them to a revenue of five hundred pounds per annum; and therefore manifests a jealous and unfriendly spirit towards them. As well might it be said of the 39 *Elizabeth*, which has the like restriction. The jealousy, if it existed, was of the corporate powers, and not of the gift. For the sake of charity, and in a spirit of boundless favour to it, the legislature granted universally to all who should ask, in the name of religion, charity or literature, the powers of a body politic and perpetual succession. This looks little like disfavour to charity. The act does not even limit the quantity of lands or real estate which such corporations may take, dispose of, or transmit. They may hold ten or a hundred thousand acres, and may sell them and endow churches, schools or any other charitable institutions without end. Each one may become a nursery of religion and charity. The limit is on the annual *revenue*. It is impossible to find a section or a word in any law of the State of Pennsylvania, restrictive of gifts to religious or charitable uses. Such a word

would be a denial of the fundamental principles both of the colony and State, to which these uses became all the more precious, for the wrong the inhabitants had suffered in regard to one branch of them.

What does it signify, that in some of the charters from the Proprietary, in 1765, and afterwards, it is recited that for want of corporate powers the churches had lost charitable gifts and devises to them? It may have been a loss for want of a legal remedy, or of a Court of Chancery—or because from the want of a permanent body to take, individuals declined giving—or the suggestion may have been to cover that change in the policy of the Proprietary, which the approaching revolution had produced, and which he preferred to cover by the allegation of another motive—or in fine, they may have been the words of the draftsman, without any facts to support them. The Quakers lost nothing in this way, and their meetings have never been incorporated. Sometimes the legislature has assisted them by supplying trustees, after a course of years had extinguished all traces of the former trustees. 3 *Dall. State Laws*, 46, 659. Sometimes they held by possession without any legal trustee. General integrity was the substitute of law. A Friends' almshouse in Walnut Street has been held by trustees since 1714. No one has questioned, and no one can question it. Almost all the churches and religious societies in Philadelphia, have in the same way held charitable uses, for churches, for schools and for the poor. The Baptist Society, which had its controversy with Christ Church, in 1731, for the Keithian Lot, was not incorporated until the 18th of May, 1829. Christ Church and St. Peter's have held from their foundation, and still hold, such charitable uses, of the first importance to the well-being of their community—not for the special use of the church, but for hospitals, for schools and for the poor. One of these in particular, a splendid endowment, under the will of Dr. Kearsley, in 1769, for the erection of Christ Church Hospital, and the comfortable maintenance of poor widows of the Communion of the Church, was questioned at its origin by his heir at law, who instituted an ejectment for the recovery of the house in which the hospital was to be erected. The late eminent Judge Wilson, afterwards one of the justices of this court, then a member of the Bar of Philadelphia, and the Recorder of the City, Mr. Wilcox, also an eminent member of that Bar, concurred in giving a clear and decided opinion to the churches in favour of the validity of the charity; and the Records of the Common Pleas of Philadelphia County of December Term, 1773, show that the plaintiff abandoned his suit. Of this charity the churches have continued in possession ever since, and under their administration it is, as it always has been, a signal blessing to its objects. The same churches hold no less than eight charities of the same description. Mr. Whitfield, the eminent Methodist clergyman, was one of the trustees

in a deed of charitable uses, in 1740, for the establishment of a charity school, now the Charity School of the University of Pennsylvania. The city of Philadelphia herself, holds and has held other such charities for years, without a suspicion of their invalidity. *Dr. Franklin's*, under his will of 23d of June, 1789, is one of the least definite,—a gift to the *inhabitants* of the city, to make loans at 5 per cent. to young married artificers—*Kirkpatrick's* legacy, to the use of the poor of the city—*Blakely's*, to procure fuel for poor widows and housekeepers—*Scot's*, partly to the same use as *Dr. Franklin's*, and partly to be distributed in premiums to men or women, the authors of ingenious inventions—*Dr. Boudinot's* devise of 13,000 acres of land to supply the poor inhabitants of the city and liberties with fuel—*The Will's Hospital*, for the indigent lame and blind,—all these attest the same general opinion—the same perfect confidence in the validity of what are called by the bill, vague, uncertain, and indefinite charitable uses. Is this all error? Have the whole profession been so ignorant of the law of their own State, that they have seen these things done without question, have advised them, and sanctioned them by their opinions? If it is error, it is of that kind which makes the law. It is that common opinion that is evidence of the law. Lord Coke, and Sir Francis Egerton, said so in *Porter's* case, when they argued that the fact of charitable uses for the poor and for schools, throughout the kingdom, proved them to be good; and Lord Ellenborough and the Court of King's Bench, said and decided in like manner in *Isherwood v. Oldham*, 3 *Mav. & Sel.* 397.

One remark more, and I will conclude my argument by a closing reference to the authorities in Pennsylvania, and the other States of the Union, upon the subject.

The complainants' counsel have argued, that the authority of Chancery in England over charitable uses, is not a part of the original jurisdiction of the court, but a branch of the king's prerogative, as *parens patriæ*, exercised by the Chancellor as the king's personal representative; and that there is no *parens patriæ* in Pennsylvania, or if there is, that there has been no delegation of this power to the courts of Pennsylvania.

I have shown that even in England the whole subject of charitable uses belongs to the original jurisdiction of Chancery, whether that be derived or not from the prerogative of the king, as *parens patriæ*, with perhaps one exception, the case of an indefinite charity where no objects are pointed out, and there are no trustees. 3 *Peters* 497, 499. 2 *Story's Eq.* 404. But this is of no importance in Pennsylvania. "By the Revolution, the duties as well as the powers of government devolved on the people" of the respective States—all the duties and all the powers. *Dartmouth College v. Woodward*, 4 *Wheat.* 651. "It is admitted that among the latter, was comprehended the transcendent power of

Parliament, as well as that of the Executive department." *Ib.* In the people of Pennsylvania, were all the powers executive, judicial and legislative; and they have delegated all of them by their Constitution to the several departments of their government, with such exceptions only as the declaration of rights, and the Constitution of the Federal Union have made, which certainly do not include this power of the *parens patriæ* over charities. No one will say that this power is an executive power, in the sense of the Constitution of Pennsylvania, or belongs to the executive department. So far as it is judicial, it is to be exercised by the courts; and so far as it is legislative, it is in the legislative department, and has been granted by it to the courts in every case like the present. Under the act of 17th of February, 1818, 7 *State Laws*, 43, independently of the Chancery Act of 16th of June, 1836, and most especially by virtue of that act, every case of trustees for charitable use, however indefinite, and every case of charitable use for defined objects, whether there be trustees or not, is most clearly within the *powers* of the courts of Pennsylvania, as fully as in the Chancery of England. If any thing remains uncertain as to those powers, it is in regard to indefinite trusts without trustees, or in regard to a definite charity that has failed as to its precise object, and must fail altogether unless it is executed *cy-pres*. Mr. Girard's charity is a definite trust with existing and accepting trustees. As to the *principles* by which all cases of charity are to be governed, it is not admitted that they are in anywise different from those now maintained in England, or that in case of need, there will be found any defect of judicial power to administer them effectually.

This subject is particularly noticed by the commissioners appointed to revise the civil code of Pennsylvania, in their report of 9th of January, 1835, cited by the complainants' counsel. p. 19.

"The Chancellor in England exercises a general superintendence over charitable corporations and societies, and controls trustees appointed for such purposes, in the same manner as others. One of his most important functions in this capacity, is the direction of such trustees in the execution of the trust, keeping them in the channel of the donor's intention, where it is practicable, and where that is not the case, making new channels for them as near that as possible, or in the technical language, *Cy-pres*."

"So far as regards the appointment, removal or discharge of trustees, our courts have now the same powers as the Chancery, and may exercise them in the case of charities, as in other cases."

"The act of 17th February, 1818, gives express authority to the courts to call to account, and remove trustees, holding pro-

perty for religious, literary or charitable purposes, and the acts of 1825 and 1828, extend the authority to all cases of trusts."

"These powers will probably be found sufficient to keep trustees to their duty, and to prevent the trust failing for want of a suitable trustee. But in regard to the other branch of the Chancellor's jurisdiction and powers, which we have mentioned, his interference, namely, in relation to the fulfilment of the charitable purposes, the case is different. It is believed that no instance has occurred in this State, of a similar exercise of authority by our courts; and their power to interfere under existing laws, may well be questioned. If for example, a trustee should bequeath funds for charitable purposes generally, without mentioning the particular objects, or for some charitable purposes which cannot be attained, or the like, and they should be willing and competent to act, has any court in this Commonwealth power to direct, *à priori*, the application of the fund to a purpose near to that which may be supposed to have been intended, or to direct it at all? We say *à priori*, because doubtless, when the executor or trustee comes to settle his accounts, the court which has jurisdiction of his accounts, will determine whether his application of the funds has been in conformity with the directions in the will."

"We think that our courts do not possess the power of controlling such trustees, otherwise than as just mentioned, and indirectly, by the power to dismiss them if they shall mismanage the trust funds; and 'it appears to us, upon the whole, that considering the delicate nature of many questions arising upon trusts for religious and charitable purposes, it is as well to leave the law on its present footing."

Where there is what the commissioners call "a channel of the donors intention," this opinion, that the powers of the courts of Pennsylvania, for the protection and control of the trust, are co-extensive with those of the High Court of Chancery, is I apprehend, in perfect conformity with the law as it is held in that State; and this is all that regards the present controversy.

It results from what has been said under my last point, that it is of little importance whether the 43 *Eliz.* in all its enactments, extends, or does not extend to Pennsylvania. As a remedial act, an act providing a new remedy by commission from the Lord Chancellor, it does not extend. It has never been used in this form. As a declaration of certain good and charitable uses, it does. Its virtue has sunk into the law of charitable uses, and has come to us with that code. As an elevation of all such uses from the cold protection of the common law, to the warm and genial arms of equity, the nursing mother of trusts, if the statute did this, as some have asserted, and if the statute alone did it, still it did it for England, while the colonies were yet in her womb, and we were cradled in these arms at the first moment of our birth.

The language of the author of "The Abridgment of American Law," expresses, I apprehend, the nearly universal sentiment of the profession. "The statute was adopted in principle." 4 *Dane's Abr.* 5, 6, *Sec.* 10.

Ireland has adopted the statute in the same sense. *Gort v. Attorney-General*, 6 *Dow.* 136, *Powerscourt v. Powerscourt*, 1 *Moll.* 616.

Scotland has the same principle. 3 *Bligh*, 424, *Crichton v. Grierson*, 1 *McDonald's Institutes*, 612, 613.

The Judges of the Supreme Court of Pennsylvania, who made the report of the British statutes in force in Pennsylvania, mean the same thing. They did not report the 43 *Eliz.*, because formally, and as a remedy, it had not been adopted; and it was not within their appointment to report, to what extent statutes not formally adopted in all respects, had been adopted in principle, or had qualified the equity and common law codes of the State.

I therefore conclude this general view of the law of Pennsylvania, with the expression of my confidence in the doctrine, deduced from general principles, from the extension of both the common law and the equity of England, the provisions of the charter, the declarations in both her Constitutions, and the enactments of her legislature, independent of all judicial decisions, that the law of Pennsylvania contains, and has always contained, the principles of the English Law of Charitable Uses, with the full benefit, whatever it may be, of the effect of the statute of Elizabeth, to the same extent, as they are contained in the law of England. In making this full review of the subject, I will not deny myself the satisfaction of owning my debt to the copious researches and reasoning of Mr. Justice Baldwin, in the opinion delivered by him upon the will of Sarah Zane. The judgment in that case, has shed a strong and broad light over the whole subject of charitable uses. It has done much more. It has drawn from depths far beneath the surface, and placed in this light, much of the learning, which in a course of ages, had been covered up and concealed from the general view of the profession; and it is by these labours of the learned judge, that in two or three particulars only, further researches have been suggested and prosecuted.

The judicial decisions in Pennsylvania will now be cited in their order in point of time, as conclusively settling the whole controversy.

Lessee of Ex'rs of Brower v. Fromme, Addison, 362, decided in 1798. In this case, where the counsel on neither side raised a question about the validity of a charitable use, it being assumed to be valid by both, Judge Addison permitted the executors of a will—the testator's heir being unknown, and there being no Chancery powers in the court adequate to the case—to recover in ejectment an estate devised to charitable uses, which the defendant held in violation of the trust.

Gregg v. Irish, 6 Ser. & Raw. 211, in 1820. The Supreme Court sustained the dedication of a lot of ground to "public uses for the benefit of the present and succeeding inhabitants of the town of Bridgeport, to be applied and improved as the proprietors of lots, their delegates, or trustees, or a majority of inhabitants might from time to time order."

Witman v. Lex, 17 Ser. & Raw. 89. This case, which was decided in 1827, was no doubt occasioned by the decision in *The Baptist Association v. Hart's Ex'rs*, and the Maryland decisions which followed on the same side. The object of one of the charitable uses in question, was "the education of young students in the ministry of the German Lutheran Church, of which the testator was a member—under the direction of the vestrymen of St. Michael's and Zion's Churches, in Philadelphia." The trustees were two of the testator's friends. The other charitable use was a bequest to the same St. Michael's and Zion's Church corporation, the interest to be laid out annually in bread for the use of the poor of the congregation. The cause was argued when Chief Justice Tilghman and Judge Duncan were on the bench, and was decided unanimously by the court, after the death of both of those eminent men, but in conformity with the opinion they had declared to the present Chief Justice. The propositions of the court, bearing directly on the judgment they pronounced, were these—that the principles which Chancery has adopted in England, obtain in Pennsylvania, not indeed by force of 43 *Eliz.*, but as part of its own common law; and where the courts of that State are not restrained by the inadequacy of the instrument they are compelled to employ, (since that day made altogether adequate,) they give nearly, if not altogether, the same extent of relief that Chancery does in England. "It is immaterial whether the person to take be *in esse* or not, or whether the legatee, at the time of the bequest, were a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power any where over the application of the testator's bounty to those objects, or whether their corporate designation be mistaken. If the intention sufficiently appears in the bequest, it would be held valid." p. 93.

On the same day the same court gave judgment in the case of *The Baptist Church against Shewell's Ex'rs*, for a bequest by the testator for the use of that church, which was then unincorporated, and so remained until 1829. So that the case of *The Baptist Association v. Hart's Ex'rs*, was rejected, as the law of Pennsylvania, in a case precisely parallel.

McGirr v. Aaron, 1 *Penns. Rep.* 49, in 1829, was a decision incidentally in favour of a charitable use, to say a perpetual anniversary mass for the testator's soul. The judgment was directly upon the legal title only.

The Mayor, &c., of Philadelphia v. Ex'rs of James Wills, 3

Rawle, 170, in 1831. The devise was of the residue of the testator's estate to the Corporation of the City of Philadelphia, in trust, to purchase a lot and build an asylum thereon, to be called "The Wills Hospital, for the relief of the Indigent Blind and Lane;" and to apply the income to the comfort and accommodation of as many "indigent blind and lame as it would admit of, giving a preference to those of Philadelphia and its neighbourhood." The action was brought to recover from the executors a large residue in money, amounting to 100,000 dollars; and the objection was made that the city was not competent to take such a trust. The court decided unanimously to the contrary, affirming the power of the corporation to take in trust for the charity, and holding that the validity of the charity had been decided in *Witman v. Lex*.

The Methodist Church v. Remington, 1 *Watts*, 218, in 1832. The main point in this case was decided adversely to the charity, on the ground that the religious body for whose use the charitable trust was created, were not altogether residents of Pennsylvania. But in delivering the judgment of a divided court, the Chief Justice says, "The decision in *Witman v. Lex*, is full to the point, that a trust in favour of an unincorporated religious or charitable society, is an available one; and were the Methodist society constituted entirely of members resident within the State, would probably rule the case." It is not improbable that the decision on the main point may hereafter be reviewed by the same court.

Ex parte Cassel, 3 *Watts*, 440, in 1834. This was a devise establishing an Orphan House for the maintenance and education of poor orphan children. The case came before the court upon exceptions to a report of auditors on the accounts of the trustees, by whom the trust had been abused. The abuses were such as to induce the learned Chief Justice to say, that the case was "an additional instance of the futility of private charities;" and that "even when established by law, and provided with the conservative apparatus of visitation, inspection, and whatever ingenuity could contrive, these misdirected efforts of benevolence had conducted but to the emolument of the agents intrusted with their care. So it would ever be, where the vision of the visitor was not sharpened by individual interest."* But notwithstanding

* This is a melancholy picture of charitable gifts and institutions; but, while its resemblance to individual cases may be admitted—for what institutions are not sometimes abused?—we should, for the honour of humanity, be slow to admit its accuracy in point of general resemblance. We must all know many charities which have been faithfully, disinterestedly, and most beneficially administered. The city of Philadelphia has many of them, and it is to be hoped ever will have them; and, as in times past they have been, so we may predict that in all future time they will continue to be, as much a source of praise to the givers, and of honour to the visitors and trustees, as they have been and will be of comfort, relief, and improvement to their manifold objects. It would be a most painful sentiment

these discouraging remarks, the Chief Justice added, that the trust was one "which the founder had an *undoubted right to create*," and that it was the business of the court to do what they could for the execution of it.

In *Martin v. McCord*, 5 *Watts*, 494, decided in 1836, Judge Sergeant, who delivered the court's opinion, states the law of Pennsylvania, in terms at once precise and comprehensive; and there is no probability that they will be either controverted or assailed by criticism in that State. It was trespass *quare clausum fregit* by the residuary devisee of a testator, who by parol had given or dedicated the *locus in quo* to build a school house "for the benefit of the neighbourhood." The neighbours, to the number of eleven or more having subscribed and built the school house, the defendants as trustees of the subscribers, entered it according to the trust. The plea was *liberum tenementum*. The judge below was requested to charge that the trust was vague, uncertain, and void; but on the contrary, he charged that the plaintiff could not recover. The language of the judgment is this. "It is said that this trust is vague and uncertain, that it cannot be ascertained who are the neighbourhood." "But it is not true that the trust is so vague as to be incapable of execution. It is the neighbourhood that are to enjoy the benefits of the school, and the extent of the charity must be governed by circumstances. The subscribers were neighbours, and they at least would be entitled to the benefit of it; and afterwards such others, as in the exercise of a just discretion by those who had its management, could be conveniently received and educated there." "Charity schools have been favourites in Pennsylvania.

to adopt in regard to our own State and country, that we are not impressible by any thing but "individual interest," to protect charities like these; especially when we have before us, the reports of the commissioners of charities in England, under the statutes of 58 & 59 *Geo. III.*, and 1 & 2 *Will. IV.*, a magnificent work both of charity and reform. These reports, of which up to May, 1835, there had been 29 presented to the House of Commons, show an investigation by the commissioners, of 26,751 subsisting charities, with an annual income of £748,158 sterling, about 3,700,000 dollars, devoted to the education of the poor, and to the relief of the suffering; and there were still at that time six English counties to be further investigated, and six English and six Welsh counties which had not yet been investigated at all. *Shelford*, 310. There were abuses no doubt in some of these charities, from inattention or ignorance, and in some by gross venal misapplication of the funds; but the mass of cases in which there had been a faithful and intelligent administration of the trust, was too greatly preponderant, to permit us to regard such charities as "misdirected efforts of benevolence," or as evidence of the "futility of private charities." The remark of Dr. Chalmers, equally true and profound, on the subject of both literary and spiritual endowments, should never be forgotten—that the natural weakness of the appetite for instruction in religion and letters is such, that men for the most part will not purchase either, except at less than the prime cost; while for every article of ordinary merchandize, they are willing to give more. All charities or endowments for education of every kind, religious, literary, and scientific, are therefore most especially worthy of encouragement as well as protection, to supply this noble commodity at a rate that will induce every one to purchase it, and to give it away to those who cannot or will not take it on any other terms. *Lectures on Ecclesiastical Establishments*, *Lect.* 2, p. 42 to 65.

They were introduced shortly after the arrival of William Penn, in the parts of the State first settled, and have since been common. No question, till of late years, was ever made of the legal validity of such trusts; and the integrity and benevolence of their founders and managers have, with few exceptions, rendered any aid from the laws unnecessary. Where, however, such establishments were questioned, as in *Witman v. Lex*, they were supported under a common law of our own, which had grown up by general consent and usage, by which, without the direct force of the statute of 43 *Eliz.* all its beneficent provisions were recognised, so far as they applied to the charitable institutions subsisting among us."

The latest Pennsylvania adjudication is in *Zimmerman v. Anders*, decided by the Supreme Court, in January, 1844. It was an ejectment by Anders and Schultz, poor officers of the Schwenkfelder Society, to recover a messuage and fourteen acres of land, included in the residue of the real estate of Edmund Flinn, who had devised the same to "The Schwenkfelder Society's poor officers hands, to be for the poor of their Society." At the testator's death, he was a member of this society, which had been a long time associated for religious purposes; but the society was not incorporated at the time of the death of the testator, nor at the time of bringing the suit, but was incorporated afterwards. The main point in the cause was the validity of this charitable use, and the judgment of the court delivered by *Sergeant, J.*, disposes of that point in the following manner: "That such a devise is good, and that a religious society may take and hold a bequest or devise for charitable purposes, has been too solemnly and repeatedly adjudicated, to be now called in question. No judge of this State has in any case doubted it, and every decision has sanctioned it. And it must needs be so, whether we consider either the uniform understanding and usage of the Province and State from its first settlement, or the repeated recognitions of these rights and privileges by distinct and peculiar clauses in our Constitutions, or the well-known and long-settled principle of our courts, that equity forms a part of the law of Pennsylvania, and that the doctrines of the English Court of Chancery will be enforced in our decisions, so far as they are applicable to our situation, and capable of being administered by the forms of our judicial tribunals, either in a common law proceeding, or in such branches of equity jurisdiction as are expressly given. And though the statute of 43 *Elizabeth* is not in force in Pennsylvania, it would seem it is so considered, rather on account of the inapplicability of its regulations as to the modes of proceeding, than in reference to its conservative provisions. These, I conceive, have been in force here by common usage and constitutional recognition, and not only these, but the more extensive range of charitable uses which

Chancery supported before that statute, and beyond it. Of such recognitions of parts of a statute, though the statute itself be not in force, we are not without other examples. It is unnecessary, however, to enlarge on a point so often considered, and so fully and ably examined in the various decisions. We think the devise to the plaintiffs clearly good, and that by the settled law of this State they are capable of taking and holding the lots in question, for the purposes expressed in the will."

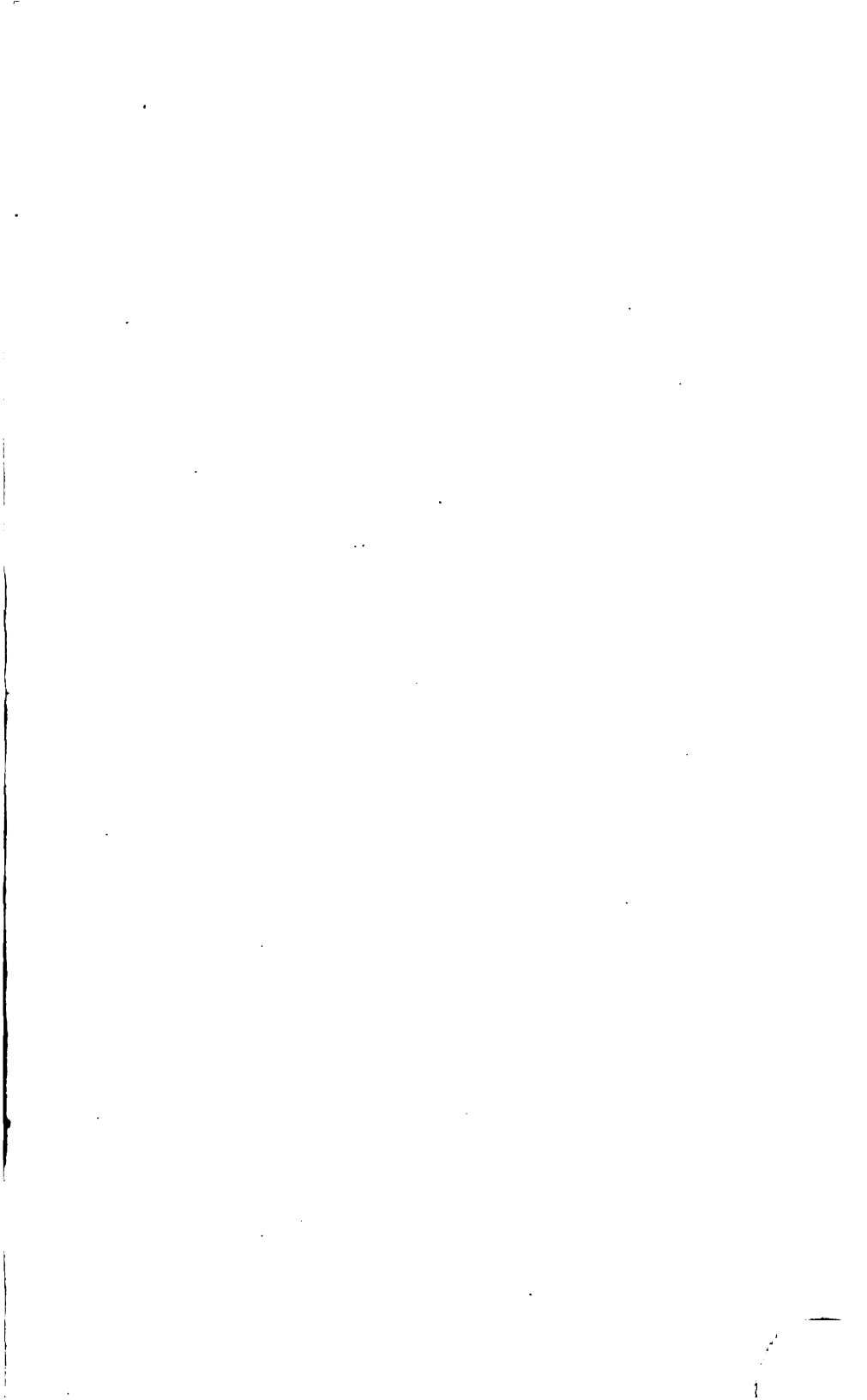
Thus stands the law of Pennsylvania on the subject of charitable uses, and so I trust it ever will stand. While we do not ask to impose it upon other States, against their will, we are happy that the adjudications of this court, over and over again pronounced, bind them not to disturb its operation upon ourselves.

In two of the States of this Union, the decision in *The Baptist Association v. Hart's executors*, seems to have been adopted, and indeed to have been carried beyond the precise limits of that judgment, which only refused to establish a charitable use for education, bequeathed to an unincorporated association, incapable of taking at law; and did not, except by the reasoning of the court, touch the case of a bequest of the same nature to competent trustees. Such cases, however, have since fallen before the judgment of Courts of Chancery, both in Maryland and Virginia. The Maryland doctrine is to be found in *Trippe v. Frazier*, 4 Harris & J. 446; *Dashiel v. The Attorney-General*, 5 Harris & J. 392; *Same v. Same*, 6 Harris & J. 1. The case of *Gallego's ex'ors v. Attorney-General*, 3 Leigh, 450, in the Court of Appeals of Virginia, adopts the same doctrine, and rejects charitable uses, whether there be competent trustees or not, if the objects of the charity are uncertain, in that sense which calls for selection at the discretion of any body. But I think I cannot be mistaken in saying as to all these cases, that the learned judges adopted as the basis of their judgments, the error in *point of fact*, which led to the judgment in *The Baptist Association v. Hart's ex'ors*, namely, that the Law of Charities originated in the 43 Eliz., and that independent of that statute, a Court of Chancery cannot by its ordinary jurisdiction sustain a charitable use, which, if not a charity, would on general principles be void. *Vid.* 5 Harris & J. 398; 6 Harris & J. 7, 3 Leigh, 468. What influence the fact of the original jurisdiction of Chancery, as it now appears, would have had upon the respective courts, if it had been shown to them, it is of little use to conjecture.

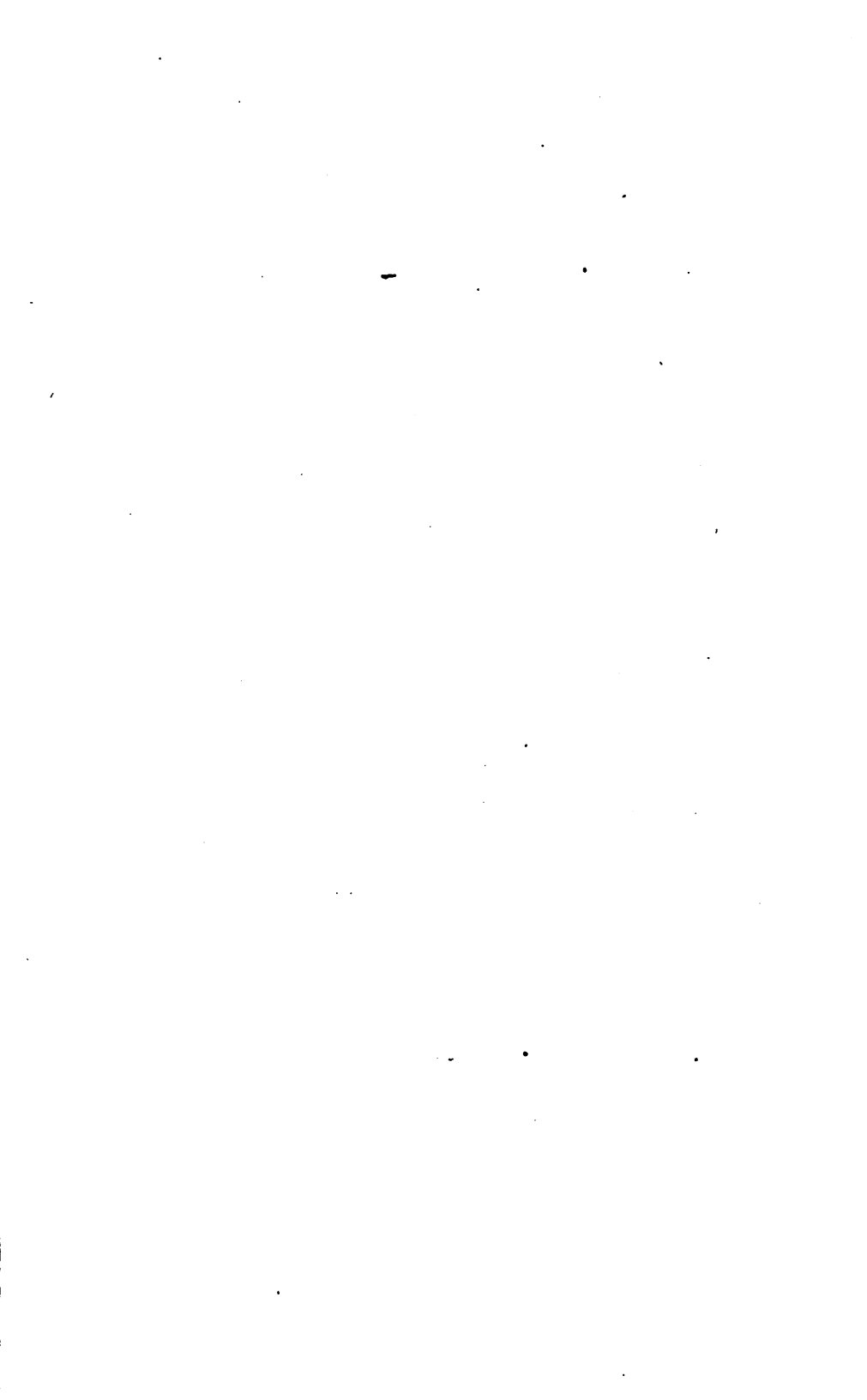
In the other States the result has been uniformly otherwise. I regard it as impossible to select from any judicial reports, a body of more thoroughly able and learned arguments by both counsel and judges, than are to be found on this question in the various reports of cases, to which *The Baptist Association against Hart's*

Executors, has given occasion. In Massachusetts there are, besides the prior cases of *Bartlett v. King's Executors*, 12 *Mass.* 537, and *Trustees of Phillips' Academy v. King's Executors*, 12 *Mass.* 537, the cases of *Going v. Emery*, 16 *Pick.* 107; *Burbank v. Whitney*, 24 *Pick.* 146; and *Bartlett v. Nye*, 4 *Metcalf*, 378. In Maine, *Shapleigh v. Pilsbury*, 1 *Greenl.* 271. In Vermont, *Burr's Executors v. Smith*, 7 *Vermont Repts.* 241. In New York, *Coggeshall v. Pelton*, 7 *John. Ch. Rep.* 292; *McCartie v. Orphan Asylum*, 9 *Cowen*, 437; *Baptist Church of Hartford v. Witherell*, 3 *Paige*, 300; *King v. Woodhull*, 3 *Edw.* 79; *Potter v. Chapin*, 6 *Paige*, 640; *Reformed Dutch Church v. Mott*, 7 *Paige*, 77; *Pear-sall v. Post*, 20 *Wendell*, 119; and *Wright v. Trustees Meth. Ep. Church*, 1 *Hoff.* 302. In New Jersey, *Ackerman's Executors v. Legatees*, cited in the report of *Shotwell v. Hendrickson*, vol. 3, 9, which is itself a full authority for the same doctrine. In North Carolina, *Griffin v. Graham*, 1 *Hawks*, 96. In Kentucky, *Moore's Executors v. Moore's devisees*, 4 *Dana*, 354. In Ohio, *McIntyre Poor School v. Zanesville Canal Co.*, 9 *Ohio Rep.* 203. In eight States therefore, the law of charitable uses is held, as it is held in Pennsylvania; and I cannot but regard it as a public misfortune to those States where it is held otherwise.

MEMORANDUM.—On the 27th February, 1844, Mr. JUSTICE STORY delivered the unanimous judgment of the Court, affirming the decree of the Circuit Court of Pennsylvania, which dismissed the Complainants' Bill.









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Argument of Horace Binney, Esq., in
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